Outboard Marine Corporation—Calhoun *and* Laborers' Local Union No. 752 *and* Connie Davis. Cases 10–CA–20636, 10–CA–21564, 10–CA–21658, 10–CA–22106, 10–CA–22167, 10–CA–22293, 10–CA–22643, and 10–CA–22709

July 17, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND OVIATT

On September 28, 1989, Administrative Law Judge Lawrence W. Cullen issued the attached decision. The Respondent filed exceptions and a supporting brief and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions to the extent they are consistent with this decision, and to adopt the recommended Order as modified and set forth in full below.[2]

A. *The Revocation of the Settlement Agreements*

The Union filed its first unfair labor practice charge (10–CA–20636) on December 12, 1984, alleging that the Respondent had discharged Larry Mulkey 5 days earlier in violation of Section 8(a)(3) and (1) of the Act. The Union filed subsequent charges (10–CA–21564) on February 26, 1986, alleging that the Respondent had violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union and refusing to grant the Union access to the plant. It also alleged that the Respondent had violated Section 8(a)(3) and (1) of the Act by discharging Julius Sexton on January 14, 1986.

The Respondent and the Union settled these cases with Board approval on May 31, 1985, and May 28, 1986, respectively. However, the Regional Director revoked these settlements on August 28, 1987, after investigating new charges which the Union filed against the Respondent. These were filed between April 1986 and September 1987, and involved a variety of alleged violations of Section 8(a)(5) and (3) of the Act. The first charge of this series (10–CA–21658), filed on April 2, 1986, alleged that the Respondent had violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union, and Section 8(a)(3) and (1) of the Act by refusing to recall the employees who had gone out on strike in January 1986, and were then on a preferential hiring list. The Regional Director issued his consolidated complaint on August 28, 1987. This complaint included numerous allegations of 8(a)(1) violations occurring (1) during the Union's organizational campaign which commenced in late 1984; (2) following the Union's election victory on April 10, 1985; (3) during the year of the union contract from January 1986 until January 1987; and (4) for a period thereafter, as to those who struck in January 1986 and returned to the plant in 1987 and their supporters.

The judge found that the Respondent's postsettlement actions justified the Regional Director's revocation of the settlements. For the reasons cited by the judge, we agree. Moreover, our failure to adopt the judge's decision in its entirety does not warrant a contrary result. Our findings here show conclusively that the Respondent committed numerous unfair labor practices continually over an extended period of time commencing with the Respondent's attempt to thwart the Union's organizing campaign and concluding with the Respondent's attempt to nullify the reinstatement rights of the strikers. It is well established that a settlement agreement may be set aside and unfair labor practices found based on presettlement conduct if postsettlement unfair labor practices are committed. *YMCA of Pikes Peak Region*, 291 NLRB 998, 1010 (1988); *Lawyers Publishing Co*., 273 NLRB 129, 130 fn. 4 (1984), reversed on other grounds 793 F.2d 1062 (9th Cir. 1986).

The revocation of the settlements does not, however, warrant the judge's conclusionary finding that all presettlement complaint allegations may be addressed on their merits notwithstanding the expiration of the 10(b) period prior to the filing of any related unfair labor practice charge.

The Respondent's conduct generated multiple 8(a)(1) complaint allegations which had not been included in the settled charges. The Respondent alleges in its exceptions that, even if the settled charges were properly reinstated, certain of the judge's holdings involved conduct *not* ''closely related'' either to the December 7, 1984 charge (10–CA–20636), or to the February 26, 1986 (10–CA–21564) or April 2, 1986 (10–CA–21658) charges. *Redd-I, Inc*., 290 NLRB 1115 (1988).

The General Counsel, pursuant to well-established precedent, argues that the 8(a)(1) allegations are supported by the preprinted general catchall language, ''[b]y the above and other acts, the above-named employer has interfered with, restrained and coerced employees in the exercise of rights guaranteed [them] in

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] We shall note our modifications seriatim in the order established by the judge in his decision.

Section 7 of the Act,'' appearing on the standard Board charge form.[3]

We agree with the General Counsel that the 8(a)(1) allegations are properly considered in this proceeding, but for the following reasons. After the judge issued his decision in this case, we reconsidered the precedent relied on by the General Counsel with respect to complaint allegations involving Section 8(a)(1). In *Nickles Bakery of Indiana*, 296 NLRB 927 (1989), we held that the preprinted general catchall language may not be relied on to support more particularized complaint allegations. Instead there must be a showing of factual ''relatedness'' between the specific charge and the 8(a)(1) allegation of the complaint. The test is: (1) whether the charge and complaint allegations involve the same legal theory; (2) whether they arise from the same factual circumstances; and (3) whether a respondent would raise similar defenses to both allegations. Id., slip op. at 5. We further refined this test in *Beretta U.S.A. Corp.*, 298 NLRB 232 (1990), in which we found that 8(a)(1) complaint allegations of interrogation, threats, and impression of surveillance were closely related to the charge allegations of multiple 8(a)(3) and (1) violations based on conduct involving a union activist (reprimanding, disciplining, withholding overtime work, withholding a wage increase, suspending, and ultimately discharging the employee). We noted that ''all these actions were part of the Respondent's unlawful course of conduct in seeking to defeat the union organizing campaign at its Accokeek facility in the winter of 1987–1988.'' Id. at 232 fn. 1.[4]

The incidents at issue here involve threats of plant closure made to employees in November 1984 and their repetition together with other various threats in April 1985 (the election occurred on April 10), and in December 1985 and January 1986. At these later times, the Respondent made threats not only of plant closure but also threats that employees would lose their jobs and never work in the county again if they struck; that it was futile for employees to support the Union because they were never going to get a contract (''it would be a cold day in hell''); and that the Respondent was going to get the Union out of the State of Georgia. There were also threats that the Respondent would give bad recommendations and did not want any employees with union cards, and promises of benefits for getting rid of the Union.

We find that all of these incidents are closely related to the charge allegations. Thus the December 1984 threats of plant closure were closely related to the charge allegation of unlawful discharge of Larry Mulkey as components of the Respondent's unlawful course of conduct in seeking to defeat the union organizing campaign at its Calhoun plant. Further, the threats at election time in April 1985 and at the end of that year and the beginning of 1986 are all closely related to the charge allegations of the unlawful discharge of Julius Sexton, the unlawful failure to recall strikers, and the unlawful failure to bargain with the Union in good faith. These threats, together with the other 8(a)(1) allegations, are all components of the Respondent's unlawful response to the Union's election victory on April 10, 1985. Accordingly, the merits of the 8(a)(1) allegations at issue are properly before us.[5]

B. *The 8(a)(1) Allegations*

The judge made findings of multiple 8(a)(1) violations occurring prior to the representation election on April 10, 1985, between the election and the end of the strike on January 21, 1986, and during 1986 and into 1987. (The 1-year contract expired on January 21, 1987, and strikers continued to return to the plant thereafter.)

The Respondent excepts to these findings by the judge for the most part by simply reciting the judge's decision in numbered paragraphs in its ''Exceptions'' document. We find no merit to these perfunctory exceptions. The judge's findings in question are supported by the credited evidence. Accordingly, we adopt those findings for the reasons set forth by the judge.

We also find no merit to the Respondent's exceptions that challenge certain 8(a)(1) findings on the ground that supervisors were not involved in the incidents on which they were based. Thus, the Respondent makes the conclusionary assertion that the evidence as credited failed to show that Greg Free, Steve Fowler, and Bo Harris were statutory supervisors at certain times when they engaged in proscribed conduct. We find no merit to this assertion and find, for the reasons stated by the judge, that all three of these individuals exercised supervisory authority. At the minimum, management told employees to report to them, and they were the first line of authority in the employees' daily work with respect to such matters as overtime, time off, and discipline. We have found such individuals to be statutory supervisors. See *Cannon Industries*, 291 NLRB 632 (1988).

Finally, the Respondent excepts to certain other 8(a)(1) findings by asserting that there was no coercion in the following conduct: (1) remarks made by Super-

[3] The incidents at issue form the basis for the judge's Conclusions of Law 5 through 22.

[4] See also *Nippondenso Mfg. U.S.A.*, 299 NLRB 545 (1990). Chairman Stephens filed a concurrence based on his partial dissent in *Redd-I, Inc.*, supra.

[5] We note that one incident—Production Manager Fulmer's December 1985 promise of a good supervisory position to Chief Union Steward Ray Moore if Moore agreed to help Fulmer get rid of the Union—parallels conduct alleged at later dates and is therefore cumulative, having no impact on the remedy. It is thus unnecessary for us to reach the merits of the allegation based on this conduct. See *Sewell-Allen Big Star*, 294 NLRB 312, 315 fn. 11 (1989); *R. L. White Co.*, 262 NLRB 575 fn. 2 (1982).

visor Dick Andrews to employees Ty Bramlett and Molly Evans in November 1984; (2) remarks made by Supervisor Howard Gallman to employees Reba Cook and Evelyn King in December 1985; and (3) remarks made by Plant Manager Sam DeFalco's to employees assembled for a luncheon meeting in September 1986. Andrews stated that management knew Larry Mulkey was campaigning for the Union and that he should watch his step because management might find ways to terminate him. Gallman stated that the Respondent would never give the employees a contract. Reba Cook's credited testimony was that Gallman asked her how the contract negotiations were progressing and she responded by indicating that they were not going very well and wanted to know Gallman's ''honest opinion.'' Gallman responded: ''This company will never give you a contract.'' He repeated this assertion and denied he was ''kidding'' in response to Evelyn King's inquiry. King's credited testimony corroborated Cook's. DeFalco stated that strikers remained on the preferential hiring list only for the year of the contract and that even though he could produce more at the plant, he would consider only a few strikers for recall when that year had run. He also stated that a unionized plant in the Respondent's organization had lost jobs and would not get a new contract, and that the presence of the Union at the Calhoun plant precluded the employees from receiving the pay raises being given at other plants. As to this last assertion, Nancy Cochran's credited testimony was that DeFalco said: ''all other plants was getting a raise, but he couldn't give us a raise even if his boss told him to because we had a third party.'' On cross-examination, Cochran responded ''yes'' to the question: ''Didn't [DeFalco] say that the reason he couldn't give you [a raise] was because of the Union contract and that controlled wages.''

The Respondent disingenuously asserts in its exceptions that Andrews manifested concern in his remarks, Gallman honesty in his, and DeFalco vagueness in his remarks about the strikers and the unionized plant, and accuracy in his remarks about the pay raise. We, however, agree with the judge's findings of coercive conduct. Andrews' statement that management was trying to fire a union activist and DeFalco's statement that strikers would not be recalled despite the availability of work warned employees that the same unwanted fate of job loss awaited them if they exercised statutory rights.[6] Gallman's statement that the Respondent would never sign a contract admonished employees that they exercised Section 7 rights in vain, since a collective-bargaining agreement would never be obtained. Cook's request for an honest opinion did not negate the inherent coerciveness in Gallman's remarks.[7] DeFalco's statement that unionized plants lost jobs and did not renew contracts forewarned employees that their jobs were endangered by a futile exercise of statutory rights.[8] And DeFalco's statement that the Union's presence meant employees must forgo pay raises in effect at the Respondent's other plants indicated that the Respondent would do more for employees if they were unrepresented. We are not persuaded that Cochran's response to a leading question changed the clear implication of her credited testimony.[9] DeFalco went beyond merely comparing benefits available to unrepresented and represented employees. DeFalco made an implied promise of benefits conditioned on rejection of the Union.[10] Accordingly, we adopt the judge's findings of 8(a)(1) violations in these remarks.

C. *The Unilateral Implementation of Contract Proposals in the Absence of Impasse*

The judge found that the Respondent violated Section 8(a)(5) of the Act when it unilaterally implemented wage and benefit increases on January 15, 1986, in the absence of a lawful impasse in negotiations. He also found that this conduct violated Section 8(a)(3) of the Act as a component of the Respondent's unlawful plan to rid itself of the Union.

The Respondent excepted to these findings. We find no merit to the Respondent's contentions with respect to the Section 8(a)(5) violation. The judge correctly found that the credited testimony of the Union's chief negotiator, Richard Barnes, showed that the parties had not taken unmovable positions on the issues which divided them—wages, procedures for processing grievances, and paying union dues—during the bargaining which occurred on the night of January 14. By that time, however, the Union had authorized a strike to commence on January 15 because the parties had been negotiating since May without reaching agreement.

The January 14 negotiating session commenced with the Respondent, through its chief negotiator, Jim Miles, presenting the Union with a complete contract proposal which continued to adhere to its ''peer review'' plan in lieu of a traditional grievance and arbitration procedure which the Union sought. This proposal had no language on either duration of the contract or the newly offered checkoff procedure providing for direct bank deposit of union dues. The Union spent 3 to 4 hours examining this proposal for changes and new items and sent requests for clarification through the mediator. The Union formulated a counter-

[6] See *J. P. Stevens & Co.*, 244 NLRB 407, 421 (1979), enfd. 668 F.2d 767 (4th Cir. 1982).

[7] See *Without Reservation*, 280 NLRB 1408, 1417 (1986).

[8] See *Naum Bros., Inc.*, 240 NLRB 311, 317–318 (1979), enfd. 637 F.2d 589 (6th Cir. 1981).

[9] See *J. P. Stevens & Co.*, supra at 438 (''the likelihood that the leading of incumbent employees would produce responses favorable to company counsel . . . .'').

[10] See *McCarty Processors*, 292 NLRB 359, 363–365 (1989).

proposal and, as midnight approached, told the mediator to notify the Respondent that its counterproposal would be ready shortly. The mediator returned with the message that the Respondent's negotiator was leaving due to exhaustion. Barnes urged the mediator to counsel the Respondent to examine the Union's counterproposal because of the imminent strike. Miles replied that he was too tired to continue. Barnes then sought further clarification of the Respondent's new checkoff procedure because the Union did not understand it, and wanted it reduced to writing as Miles had promised. Barnes asked for the duration that the Respondent was proposing for the contract because without this information the economic aspects of the contract could not be resolved. Miles said that he was prepared to negotiate 1, 2, or 3 years, but would not make a proposal.[11] Barnes then gave Miles the Union's counterproposal, but Miles again said he was too tired to continue and would take a look at it and return to negotiations. Barnes said that the Union was prepared to stay all night because of the impending strike, but Miles repeated that he was too tired. Barnes suggested the parties meet on January 16 and 17, but Miles asked to wait until the next week. Miles said that he felt the parties had reached impasse. Barnes countered that he disagreed because the Respondent had given the Union a new proposal at the outset of the meeting and had neither fully responded to the Union's requests for clarification nor fully reviewed the Union's counterproposal. Miles replied that he was too tired to discuss anything further that night and left.

The Union's proposal of January 14 included many modifications: the elimination of work rules; concessions on some aspects of management rights and on the dental coverage in the group insurance; agreement with the Respondent to substitute classification seniority for labor grade seniority; proposals tracking more closely the Respondent's proposals on shift preference, seniority, leaves of absence, funeral leave, health and safety, shift premium, and call-in requirements; and a proposal to split the difference on the period to define temporary assignments. There was also a substantial change in the Union's position on grievance and arbitration. In response to the Respondent's proposal to remove the Union from the grievance procedure, the Union proposed an appointed employee grievance committee that would settle grievances on behalf of the Union. Union involvement would be limited to later stages in the absence of a settlement.

[11] Barnes testified:

> I told Mr. Miles that we could make changes in our economics, our wages, but I needed to know what the length of contract was. That I had movement. But I wanted to know if this five and three-quarter percent was for a one-year agreement. Was it five and three-quarter percent for three years? Or was it five and three-quarter percent each year of a three year agreement? . . . we didn't know, and he would never tell us that.

The judge correctly found no merit to the Respondent's contention that the parties were deadlocked on the issues of arbitration, checkoff, and wages. The Union had proposed eliminating its participation in the early stages of the grievance procedure. The Respondent's own notes for the January 14 negotiating session confirmed that Barnes was still seeking clarification of the Respondent's new, unwritten checkoff proposal at the end of the January 14 meeting. Further, the failure of the Respondent to settle the duration of the contract it proposed precluded any final resolution of the contract's economic package. In this posture, we find, as did the judge, that the record fails to establish that on January 15, when the Respondent declared impasse on these issues, further good-faith bargaining would have been futile. See *Hotel Roanoke*, 293 NLRB 182, 182–184 (1989); *Sacramento Union*, 291 NLRB 552, 556–557 (1988). We accordingly adopt the judge's finding that the Respondent violated Section 8(a)(5) of the Act by changing the terms and conditions of employment at the plant on January 15, 1986, in the absence of a lawful impasse.

The judge also found that the unilateral changes, in the absence of a lawful impasse, violated Section 8(a)(3) of the Act. He noted the Respondent's conduct during the negotiations. At the outset the parties agreed to negotiate the ''language'' of the contract before the ''economic'' package. At the October 7, 1985 negotiating session, Miles told union negotiator Howard Henson that the Respondent wanted to give employees a 5-percent wage increase immediately. When Henson rejected this offer because of the numerous ''language'' issues left unresolved between the parties and noted their priority over ''economic'' issues pursuant to the parties' agreement on the conduct of negotiations, Miles offered 5-1/2 percent if Henson would agree. Henson declined. The next day, the Respondent posted a notice to all bargaining unit employees indicating that the employees would have received the pay raise and certain other improved benefits effective the previous day, had the Union agreed. At the December 10, 1985 negotiating session, Barnes asked Miles whether the Union would have to strike to get a contract. Miles claimed that the Respondent had a history of making concessions after the commencement of a strike. Finally, on the night of January 14, the Respondent precipitously declared an ''impasse'' in negotiations and immediately increased wages and benefits on January 15 as it hired strike replacements.

The judge found the Henson incident to be manipulative conduct and gamesmanship designed to undermine the Union, and the December 10 incident to be an inducement for the Union to strike. He found all the cited events to be part of the Respondent's predetermined scheme to rid itself of the Union.

The Respondent excepts, arguing that the complaint contains no allegation concerning an independent violation of Section 8(a)(5) because of manipulative conduct or gamesmanship. It contends that the Respondent normally reviewed salaries in October and that there had been no increase at the Calhoun plant since October 1984, that since the latter part of 1985 the Union had been publicly declaring that a strike would be necessary because of the Respondent's alleged failure to bargain in good faith, and that a lawful impasse occurred on the night of January 14 and lawful unilateral changes on January 15.

We note that the evidence cited by the judge, together with certain other aspects of the Respondent's unlawful conduct, may be indicative of the Respondent's overall bad-faith bargaining.[12] However, the complaint did not include this allegation. Further, conduct indicative of a statutory failure to bargain in good faith does not establish discriminatory conduct, in violation of Section 8(a)(3). Unlike the judge, we are not persuaded that the Respondent's overall animus and conduct prove a preconceived plan to rid the Calhoun plant of the Union and that, therefore, the unlawful impasse was necessarily discriminatory. We find that in the absence of specific evidence,[13] the General Counsel has failed to prove this aspect of the complaint and we shall therefore dismiss it.

D. *The Alleged Refusal to Bargain About Training Employees for the Peer Review Appeals Panel*

We adopt the judge's finding that the Respondent violated Section 8(a)(5) and (1) by refusing to bargain with the Union about training employees for the peer review appeals panel for the reasons cited by the judge.[14] We disagree with our dissenting colleague's conclusion that: (1) the parties understood that the Respondent's proposal contemplated that the Respondent alone would train employees; (2) the Union waived its right to participation by agreeing to the Respondent's proposal without raising the issue of participation in training; and (3) the contract's zipper clause[15] therefore relieved the Respondent of the obligation to bargain further regarding an issue settled in the contract.

The credited testimony reveals that the Respondent's peer review proposal was discussed at two negotiating sessions during November 1985. At the latter of these meetings, the Union's chief negotiator, Richard Barnes, made it clear to the Respondent's chief negotiator, Jim Miles, that the Union ''would not entertain'' the Respondent's proposal ''without having some impact into the program.'' Further, in discussing the Union's proposal providing for joint training, Barnes confirmed that the Respondent proposed training employees during nonwork hours. Barnes therefore argued that he, Barnes, might participate since the designated time precluded his disruptive presence in the plant during worktime. Although the Respondent rejected the Union's joint training proposal, Miles told Barnes that Barnes' participation in training ''could be worked out.''

During subsequent negotiations, the Union adhered to its original traditional grievance-arbitration proposal and there was no discussion of peer review training. The contract signed on January 21, 1986, contained the Respondent's peer review system but stated only that an eligible employee must ''be willing to complete a training program in problem resolution in non-work hours.'' Shortly thereafter, on January 31, 1986, Barnes wrote to Plant Manager John Florip requesting, inter alia, the names of the employees who had volunteered for the program together with ''a date you will be able to meet with the union to develop a curriculum for this training program.'' Barnes noted the dependency of employees' contractual rights on the training program, and urged Florip to meet on this matter ''no later than February 12, 1986.'' Barnes wrote Florip again on February 19, 1986, stating:

> I again stress the importance of a meeting to develop a training program for appeals panel members. Employees cannot have grievances heard until this is accomplished . . . contact me as soon as possible to set this program up.

[12] See *Hotel Roanoke*, supra, 293 NLRB at 184–185.

[13] See *Venture Packaging*, 294 NLRB 544, 550–556 (1989).

[14] Member Devaney disagrees that the Respondent violated Sec. 8(a)(5) and (1) by refusing to bargain with the Union concerning the Union's participation in the training of employees for the peer review appeals panel. Although the Respondent told the Union at a bargaining session in November that the parties might be able to work out language accommodating the Union's desire to participate, it was clear that the parties understood that the Respondent's proposal contemplated that the Respondent alone would train employees. Other proposals regarding grievance resolution were exchanged before the Respondent included its peer review proposal in its final offer. In agreeing to the final offer, the Union did not propose language providing for its participation in training or attempt in any other way to ''work out'' the issue of training. Thus, Member Devaney would find that the Respondent succeeded in securing the Union's agreement to language giving the Respondent the right to train the employees, and that the parties' zipper clause relieved the Respondent of the obligation to bargain further regarding an issue settled in the contract. In Member Devaney's view, the Union's failure to make a proposal with respect to the training during negotiations should not enable it to reopen the issue after the contract has been signed. See his dissent in *Michigan Bell Telephone Co.*, 306 NLRB 281 (1992); Cf. *TCI of New York*, 301 NLRB 822 (1991).

[15] The zipper clause states:

> It is agreed by and between the parties hereto that the following shall constitute and be the entire agreement between the parties hereto in respect to rates of pay, hours of work and other conditions of employment for and during the term of this agreement, and neither party shall be required to meet or negotiate with the other during the term of its agreement on any bargaining issues or subject, including grievances, except as herein may be specifically provided and all rights and obligations created or incurred under and by virtue of the provisions of this agreement shall terminate with the termination of this agreement.

The Respondent ignored the Union's requests on this matter.

As we recently noted,[16] we will conclude that a statutorily protected right has been waived only where the applicable contract's pertinent provisions as well as its zipper clause clearly and unmistakably indicate such a waiver. Here the contract merely establishes a training program for the peer review appeals panel; it is silent about the details of the program. Further, the contract's zipper clause does not cover the Union's proposed training because there is no language indicative of settlement of all demands and proposals made by either party during negotiations.[17] Thus the zipper clause cannot be construed as a waiver of bargaining on joint training. Moreover, the credited evidence shows that the parties neither intended the pertinent provisions nor the acceptance of the contract to operate as a waiver. When the parties last discussed joint participation in training for the peer review appeals panel, the Respondent was told that the Union would not accede to the Respondent's proposal without the participation of the Union in the training, and the Respondent assured the Union that this ''could be worked out.'' Indeed, the Union's acceptance of the overall proposal in signing the contract was immediately followed by the Union urging the Respondent to meet promptly about training because the contractual rights of employees were at stake. In these circumstances, we find that the evidence establishes that there was no waiver and we agree with the judge that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union about training employees for the peer review appeals panel.

E. *The Unilateral Elimination of Bargaining Unit Jobs*

The judge found that the Respondent violated Section 8(a)(5) of the Act by failing to negotiate with the Union concerning the elimination of bargaining unit jobs. We adopt this finding for the reasons stated by the judge, who found that the elimination of jobs was a mandatory subject as an *effect* of certain production process changes. The Respondent's exceptions are without merit. However, we shall discuss the Respondent's procedural contentions because the judge failed to do so.

On October 23, 1987, the Respondent, on the record, raised an affirmative defense to the allegation that it had failed to recall strikers in violation of the Act. The Respondent claimed that changes in equipment, methods, layouts, and work assignments eliminated bargaining unit jobs which precluded returning strikers to their former positions. The judge granted the General Counsel's motion to amend the complaint to include the allegation that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally eliminating bargaining unit jobs without notice to or consultation with the Union since approximately October 25, 1985.

The earliest date alleged for this violation is within 6 months of the 8(a)(5) charge filed against the Respondent in Case 10–CA–21658.[18] The same section of the Act is at issue, the amendment to the complaint arose from the Respondent's defense to other allegations in the complaint, and the allegation of the Respondent's failure to meet its statutory bargaining obligations (the charge) encompasses a similar failure deriving from the contract itself (this allegation). Further, the Respondent had ample opportunity to respond to the General Counsel's cross-examination of its witnesses in defending both the allegation concerning the recall of strikers and the amended allegation concerning the elimination of bargaining unit jobs. See *Redd-I, Inc*., supra, 290 NLRB at 1117; *Nebraska Bulk Transport*, 240 NLRB 135, 154–156 (1978), enfd. in pertinent part 608 F.2d 311 (8th Cir. 1979). The Respondent's procedural contentions, therefore, lack merit.

F. *The Unilateral and Discriminatory Imposition of a Labor Pool Policy*

The judge found that the Respondent violated both Section 8(a)(5) and Section 8(a)(3) of the Act by instituting a ''labor pool'' policy after the strike. The judge cited Plant Manager Sam DeFalco's 1987 memo concerning the plant's greater flexibility and DeFalco's testimony that he made changes at the plant without notifying or bargaining with the Union. The judge also cited employee testimony and records indicating that employees were transferred more often after the strike than before the strike. The judge then made the conclusionary finding that the ''labor pool'' policy was partly instituted to thwart the return of the strikers and that the Respondent failed to refute its unlawful motivation.

The Respondent excepts to both the 8(a)(5) and the 8(a)(3) finding. It maintains that labor grade 3 employees were interchangeable[19] and had always been ''labor pool'' employees and cited a prestrike memo (July 31, 1985) in which the term was so used. The Respondent also cites the contract's management-rights clause which designated management control of temporary transfers ''between jobs, shifts and departments in order to maintain efficient and/or economic operations.'' It notes that the Union failed to file griev-

[16] *Michigan Bell Telephone Co*., supra.

[17] Compare the language of the zipper clause cited in *Michigan Bell*, supra.

[18] April 2, 1986; see sec. A, supra.

[19] Reba Cook testified that Plant Manager John Florip told her that the skills of the various positions at the plant were not interchangeable.

ances concerning any increase in the number of temporary transfers after the strike. Finally, the Respondent argues that any evidence of animus was rebutted by a legitimate business reason, attaining the flexibility needed for increased efficiency and productivity.

We find merit to these exceptions. Certainly employees testified that they moved more frequently after the strike and the records confirm this conclusion—3.38 moves per employee in 1985 and 5.74 in 1986. Also, Plant Manager Sam DeFalco testified that one of the changes he instituted at the Calhoun plant was to train employees for different jobs rather than restricting them to one specific job, and his ''desk memo'' to all employees celebrating the end of fiscal 1987 emphasized this. It stated in pertinent part: ''We are a more flexible organization. Our lives are not dedicated to one specific job . . . . Since all of our workers are now trained in more than one job, our productivity has soared.''

However, the evidence also shows that movement from one position to another on the plant floor was also common before the strike. Indeed, during negotiations in August, September, and October 1985, the Union submitted a proposal for an ''all purpose crew'' which would be available to fill any position on the plant floor on an ''as needed'' basis and would be paid an extra 50 cents an hour. The union representatives testified that this proposal was the Union's response to the Respondent's concerns about absenteeism, and employee complaints generated when the Respondent eliminated the second shift in May 1985 and used many of the second shift employees as floaters.[20]

We find the evidence insufficient to show a change in the practice of having employees available to fill a variety of positions on the plant floor. Any departure from the existing terms and conditions affecting employees in this regard was one of degree. Employees themselves acknowledged that they had filled more than one position on the plant floor both before and after the strike. Union representatives demonstrated concern about this issue by making a proposal for a special floating crew during contract negotiations. Thus, Sam DeFalco's ''change'' was not a change in job classifications or transfer policies but rather represented a greater emphasis on flexibility in an existing system that already featured employee job shifts in the interest of efficiency. It therefore falls within the range of those shifts in form or degree that do not rise to the level of a substantial and material change in terms and conditions of employment.[21] The preponderance of evidence does not support finding the violation here.

[20] The Union's bargaining representatives testified that the term ''labor pool'' was not used during the contract negotiations.

[21] See *Wabash Transformer Corp.*, 215 NLRB 546, 547 (1974); *Rust Craft Broadcasting of New York*, 225 NLRB 327 (1976); *UNC Nuclear Industries*, 268 NLRB 841, 847–848 (1984).

We are also not persuaded that the Respondent violated Section 8(a)(3) of the Act in emphasizing greater flexibility in job assignments at the Calhoun plant. The judge cited no evidence to support his conclusionary finding that the Respondent instituted this ''change'' to preclude the return of strikers to jobs in the plant. The judge's determination apparently flowed from his erroneous finding that *every* aspect of the Respondent's conduct may be viewed as part of a preconceived plan to rid the Calhoun plant of the Union. As indicated above,[22] we find that in the absence of specific evidence, the General Counsel has failed to prove this aspect of the complaint and we shall therefore dismiss it.

G. *The Unilateral and Discriminatory Change in Overtime Policy*

The judge found that the Respondent violated Section 8(a)(5) and (1) by unilaterally altering its overtime policy in January 1987, and that this unilateral change also violated Section 8(a)(3) and (1) because it formed a part of the Respondent's unlawful efforts to prevent the strikers from returning to work. We disagree and find that the General Counsel has failed to show that the Respondent altered a past practice.

The record shows that in 1985 and 1986 the Respondent regularly scheduled overtime by posting the schedule for the upcoming month and advising employees to take questions or problems to supervisors.[23]

[22] See sec. C, supra.

[23] Employees were advised as follows:

TO ALL EMPLOYEES
August 19 through August 22, 1985

All employees are scheduled to work 10 hours starting Monday, August 19 through Thursday, August 22.

First shift will operate from 7:00 a.m. till 5:30 p.m. Second shift will operate from 3:30 p.m. till 2:30 a.m.

Those employees whose overtime schedule is different will be notified by their immediate supervisor.

If you have any questions, please feel free to ask me or your immediate supervisor.

March 21, 1986

TO ALL EMPLOYEES!

THANK YOU! Each of you have worked some long hours and put forth a great effort these past several weeks. Your efforts are greatly appreciated.

Many of you are new to this type of work. Nearly all of you have learned new jobs in the past two months. Your enthusiasm toward your jobs and your willingness to learn has been fantastic. We are all learning more each day . . . and it is a good feeling.

Now, with all of this effort, where are we? And what can you expect?

Our objective, as previously explained, is to have 4100 motors packed by the close of business on Thursday, March 27th . . . 1700 V-6, 1500 V-4, and 900 2 and 3 cylinder motors. This will not get us up to schedule, but will cover our immediate sales needs for this month. Product availability is extremely important

Continued

Plant Manager DeFalco testified that before 1986 management had relied too heavily on overtime because it had not effectively scheduled work. His own philosophy was to reduce dependence on overtime by careful scheduling, but that some overtime, averaging less than 6 to 7 percent overtime hours per month, allowed the Company flexibility to handle the exigencies of suppliers and customers, limited stress on employees by holding their schedules to a maximum of 9 straight hours, no two consecutive Saturdays, and no work at all on Sundays, and prevented the problems associated with laying off employees and then recalling them for short periods.

On January 26, 1987, 5 days after the contract expired, Manufacturing Manager Tetzlaff notified employees that the plant could not meet the January production quota and that scheduling extra overtime was preferable to recalling inactive employees only to lay them off after a few days, a step ''neither practical nor in the best interest of our employees.'' Thus, Tetzlaff concluded, January's arrearages would be spread into February, with employees working 9-hour days and Saturdays where necessary.[24] As a result of this policy, overtime ranged from 2 to 4 percent of total hours in January, but from 9 to 20 percent of total hours in February.[25]

Payroll Week Ending Date	*Overtime Hours*	*Total Hours Worked*	*Percentage*
1/4/87	—	0	—
1/11/87	254	6,417	3.96
1/18/87	174	6,238	2.79
1/25/87	72	4,213	1.71
2/1/87	1570	7,924	19.81
2/8/87	625	6,876	9.09
2/15/87	841	7,022	11.98
2/22/87	788	7,039	11.20
3/1/87	630	6,729	9.36

The General Counsel contends that the Respondent changed its low overtime policy to keep from having to recall strikers and in derogation of its obligation to bargain. The Respondent contends that increasing overtime to handle a backlog did not change its past practice: it had increased overtime while employees were on layoff in the same manner in August and October 1985. The Respondent also notes that any vacancy created by the January 26 notice would last only about 5 days, and thus would not constitute ''substantially equivalent employment'' for strikers waiting for recall.

The judge found that the January and February increases in overtime hours were ''significant,'' but made no finding of fact that this increase differed from the Respondent's past handling of a heavy workload that could not be handled without extraordinary means. He merely concluded that the January and February extra overtime was an unlawful unilateral change of an unspecified past practice.

Significantly, the General Counsel's argument is as bereft of a factual predicate for a finding of an unlawful change in past practice as the judge's. He does not argue either that the Respondent's basis for ordering the increased overtime—the extra workload in January and February—was nonexistent or that increasing overtime hours to handle extra work—as opposed to recalling laid off employees for brief periods—was a change

during this time of the year . . . and supplying a timely quality product is our reason for being here.

So far, we have produced 1150 V-6, 1094 V-4, and 618 small motors. This means that we must produce the balance today, tomorrow (Saturday) and during four days next week so that we can all enjoy a three day Holiday Weekend.

This past several days have been our best during the last two months. Our production level has steadily increased and quality continued to improve.

Our task, to achieve our goals, is to continue what we have been doing, producing 230 outboards a day. This task is not impossible, but very achievable. The problem is that we can't seem to reach these levels, yet, with an 8 hour day. Accordingly our work schedule will have to be as follows:

Friday—3/21/86	10 Hours (previously posted)
Saturday—3/22/86	8 Hours (previously posted)
Sunday—3/23/86	No Production
Monday—3/24/86	10 Hours
Tuesday—3/25/86	10 Hours
Wednesday—3/26/86	10 Hours
Thursday—3/27/86	10 Hours

I believe that we can achieve our goals with the above work schedule. Our supplying facilities feel that they will be able to give us the necessary components to support this schedule. We all know how important these goals are.

With your continued efforts we will reach our goals and we will all then be able to enjoy a long three day weekend for Easter. Let us all plan to reach these goals so we can plan on a long Holiday Weekend by resting this Sunday (3/23) and being prepared to MAKE IT HAPPEN next week.

Thank you again.

[24] January 26, 1987

TO ALL EMPLOYEES:

It is apparent that the original daily schedule for January is no longer attainable. This is due to the lack of material in the early part of January and the loss of two days production due to weather conditions this past week both in Calhoun and Burnsville.

As a result, one of the following options had to be taken. We could recall employees for the balance of January and reduce employees on February 1st. We do not feel that this decision would be practical nor in the best interest of our employees. Therefore we have chosen the second option. We will spread the January arrears (units which were scheduled for January but not built) into February.

Based on this decision, we feel the following work schedule will be a benefit to all employees and attainable for all of us at Calhoun.

January 26–31 — 9 hours per day

February — 9 hours per day/5 days per week working Saturdays only if necessary.

[25] Overtime was as follows:

OMC - CALHOUN
Percentage of Overtime for Jan. & Feb. 1987
- Shop Hours Only -
(Overtime Hours Divided by Total Hours Worked)

in a past practice of recalling employees. Instead, the General Counsel relies on the wording of the announcement of the schedule changes, arguing that by conveying the message that it had considered and rejected the option of recalling strikers in favor of assigning overtime to currently working employees, the Respondent had engaged in a divisive '''blame the Union' tactic'' calculated to trigger resentment of the Union in employees who disliked the longer hours and to foster the conviction that employees' job security and interests could ''be furthered only by opposition to the Union.''

We agree that the notice needlessly conveyed this coercive message. If the parties had litigated the wording under Section 8(a)(1), we could sustain a finding that the notice itself violated the Act. But regardless of how the Respondent chose to present its handling of the extra work in January and February, the issue under Section 8(a)(5) is not *why* the Respondent used overtime, but whether its practice differed from that on previous relevant occasions. On the evidence presented in the record, we cannot find that it did. Similarly, the antiunion motivation revealed by the notice is insufficient to support a finding of an 8(a)(3) violation.[26] In this mixed-motive situation, we find that the General Counsel has shown prima facie that union animus was a factor in the decision to use overtime, but that the Respondent has shown that it would have dealt with the temporary upsurge in work by scheduling the overtime even in the absence of the antiunion motive. Its decision was in accord with past practice and avoided recalling employees to work for only a few days.

Accordingly, unlike the judge, we find that the Respondent did not violate Section 8(a)(5), (3), and (1) when it issued the January 26, 1987 overtime announcement.

H. *The Discriminatory Hire of Excess Replacement Employees and Failure to Recall the Strikers*

The judge found that the Respondent violated Section 8(a)(3) and (1) of the Act by (i) hiring excess numbers of replacement workers in the few days coinciding with the strike; and (ii) failing to recall strikers after the cessation of the strike even when hiring additional workers would have made it possible to manufacture additional products for which the Respondent had customers. We agree.

1. Factual findings

The strike commenced on Wednesday, January 15, 1986, and ended when the Union sent the Respondent a mailgram the following Tuesday, January 21, accepting the Respondent's contract terms and making an unconditional offer on behalf of the striking employees to return to work. During the brief period of the strike, the Respondent increased its employee complement by approximately 50 employees with a combination of some employees recalled from layoff and many new hires.[27] On receipt of the Union's mailgram, the Respondent announced that it was no longer hiring. Indeed, even though 125 employees departed in the succeeding 15 months, the Respondent recalled only 9 to 10 strikers and only contacted all those employees remaining on the preferential hiring list in the 5 months after April 1987.[28] During this time, the Respondent's employment levels steadily declined,[29] the plant failed to meet its planned production,[30] and the actual operating cost per employee increased markedly.[31] Moreover, the contract to which the Respondent and the Union agreed when the strike ended, expired after only 1 year on January 21, 1987.

Industrial Relations Manager Robert Earlie testified that he supervised hiring during the strike and required new employees to sign forms as they accepted offers of employment. The record shows that some of the forms were undated; some were dated January 17, 18, and 19. At least 10 were dated January 20.

Eunice Rayburn, who joined the strike, testified that on January 14 she asked her supervisor, Howard Gallman, to call her about hiring during the strike because she was concerned about her family. On Friday, January 17, Gallman telephoned Rayburn and told her that the Respondent had hired 50 extra people and had increased wages and benefits. Rayburn pursued her inquiry about returning to work, and telephoned Employee Relations Manager John Stoy. Stoy's secretary told Rayburn to report to the plant at 7 a.m. on Monday, January 20. On Monday, Rayburn, together with Pat Watson, Shirley Gann, Gann's son, and several others who wanted to return to work, waited in the plant's conference room from 7 a.m. until shortly be-

[26] Compare *National Gypsum Co.*, 293 NLRB 1138, 1146–1152 (1989) (overtime cutbacks).

[27] The approximately 185 prestrike employee complement increased to approximately 234 poststrike.

[28] Approximately 125 employees left the Respondent's employment between the end of the strike and the Respondent's recall of the strikers commencing in April 1987.

[29] For most months of 1986 the employee complement was slightly more than 150, declining from a high of 234 to a low of 163. In April 1987, it was 157.

[30] The Respondent operated the plant with a firm production schedule generally for between 60 and 90 days with a complete year forecast on a rolling 12 months. During 1986, the plant's average monthly percentage of plan achieved was 48.1 percent. The preceding year it had been 66.9 percent. Although the percentage improved markedly in 1987 (138.9 percent), this number is misleading because the Respondent decreased its ''plan'' by over 63 percent from 1985 levels.

[31] The record shows that, compared with the 1985 operating cost per employee, the Respondent experienced a 45-percent increase in 1986 and a 37-percent increase in 1987.

fore noon. The Respondent then told these employees that they had been replaced and were ''on call.''[32]

Nancy Cochran, who also joined the strike, testified that in the September 1986 luncheon meeting with employees, discussed above, Plant Manager Sam DeFalco said ''he could sell all the V-8's that he could get but getting them built would mean up[p]ing production and he couldn't get the people right now.'' As noted above, when asked when he would rehire the striking employees, DeFalco answered ''after the preferential hiring list in January was over . . . he would look at a few but it would be a few.'' He understood that ''some people got caught up in the flow of things.'' Suzi Suggs and Gloria Boyd testified that DeFalco made similar statements in luncheon meetings in August and October. On these occasions, DeFalco stated that ''he wanted to hire at least 150 to 200 people to get out around 1200 motors, if he could'' and that if employees ''would all just hang on until January, it would be awfully cold for the ones on the street, and awfully warm inside.'' The judge specifically credited or impliedly credited all of this testimony[33] by relying on it in making his findings.

2. Analysis

The foregoing evidence, particularly when viewed in the context of other unlawful conduct directed against union activity and the strikers in particular,[34] persuades us that, as urged by the General Counsel, protected union activity was a motivating factor in both the Respondent's hiring of excess striker replacements and its failure to recall strikers after large numbers of the replacements had departed. The Respondent hired large numbers of replacements—many of them in the waning days of the strike when some strikers were inquiring about returning—in order to defeat reinstatement rights of strikers; and, because of Plant Manager DeFalco's mistaken belief that reinstatement rights would vanish a year after the strike ended (i.e., the ''preferential list'' would be ''over''), the Respondent stalled recalling strikers during months when the departures of replacements created many vacancies and production was at a low level. Further, in Plant Manager DeFalco's revelatory language, the Respondent contemplated limiting its rehiring of former strikers to those who merely ''got caught up in the flow of things.'' The implication that the Respondent distinguished between those guilty of enthusiasm for the strike and those who were tantamount to passive participants (with possible mercy for the latter) is strong support for the finding of animus in the Respondent's delay in rehiring strikers.

We also find, for the reasons stated below, that the Respondent has not proven its defense of legitimate and substantial business justification or shown that it would have taken either of these hiring courses independently of its animus towards its employees' protected strike activity.[35]

With respect to the hiring of replacements in excess of the numbers of employees on strike, the Respondent contends that the hire of a substantial number of new employees was necessitated by the upcoming busy season, the anticipation that there would be significant turnover among the new hires, and the presence at the plant of instructors on temporary assignment from their regular positions elsewhere in the Respondent's corporation. The judge found these assertions pretextual. We agree.

The Respondent presented no evidence that it sought to hire a predetermined number of employees at the outset of the strike; it declined to rehire experienced employees who sought to return to work while it was still hiring inexperienced replacements; it made no similar increase in the number of employees in anticipation of the upcoming busy season in January 1987;[36] it used teaching teams both before and after this occasion without similar increases in the number of employees;[37] and the instructors were at the plant for sev-

[32] The Respondent alleges that Rayburn's testimony is unsupported by any of the other persons she identified. As the judge relied on her testimony in making his findings, he impliedly credited it. However, we note that there is no contrary testimony. Shirley Gann did not testify. Pat Watson testified but was not asked about the January 20, 1986 incident. Watson testified that she ''sign[ed] off for the preferential hiring list at the end of the strike.'' Her form, like those of many other strikers, is dated January 23, 1986. The Respondent's attempt to raise doubt about Rayburn's testimony is without merit.

[33] The judge referred to the testimony of Evelyn King in making a specific credibility ruling. The record shows that Nancy Cochran, Suzi Suggs and Gloria Boyd testified about DeFalco's statements at the ''Luncheon with Sam'' meetings. The judge inadvertently referred to Evelyn King rather than Nancy Cochran in making his specific ruling.

[34] The Respondent's unfair labor practices began with threats of discharge to employees when the union organizing campaign first began in 1984 and continued, after the Union won an election and was certified, with threats that the plant might close because of the Union and that a contract would never be negotiated. Even more relevant to the Respondent's pattern of hiring during and after the strike are the Respondent's numerous instances of unlawful conduct directed at the strikers. Thus, the Respondent subjected returning strikers Faye Parker, Jerry Holcomb, and James Bold to disparate treatment in discharge or other discipline (see sec. J, below), induced colleagues of returning strikers to harass them (see fn. 48, below, discussing instructions to employee Connie Davis regarding returned striker Reba Cook), and the Respondent disparately treated returning strikers with respect to leadperson duties and pay. (With regard to this latter action, we adopt the judge's findings that the Respondent unilaterally and discriminatorily eliminated leadperson duties and pay.)

[35] See *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

[36] The record shows that the Respondent had 164 employees in October 1986, 163 in November, 164 in December, 163 in January 1987, 162 in February, and 160 in March.

[37] The record shows that the Respondent placed a similar team at the Calhoun facility in November 1984. The preceding month the total number of employees was 278. In November it was 280. In

eral weeks.[38] These facts, especially the Respondent's rejection of experienced employees while it was still hiring inexperienced replacements,[39] clearly belie the Respondent's assertions.

In sum, the evidence concerning the hiring of replacements and the context in which that hiring occurred, establishes that the hiring policy was animated by discriminatory purposes rather than the Respondent's asserted legitimate business reasons.[40]

We also find that the Respondent has failed in its attempt to show legitimate business reasons for its failure during the period between January 20, 1986 (when the strike ended) and April 1987, to recall more than a few of the strikers despite the departure of a large number of replacements.

As noted in the factual summary above, the plant failed to meet the Respondent's own production plan for a substantial part of that time, production was low throughout in comparison with prestrike levels, and the operating costs per employee increased significantly. The Respondent presents no specific refutations of these figures. Indeed, it concedes that if ''one looks solely at motors produced, it might appear that production declined between April 1986 and January 1987.'' The Respondent's defense essentially boils down to a claim that, although it is engaged in the manufacture and sale of outboard motors, it was, during the period in question, interested only in product quality and individual employee productivity and was virtually unconcerned about how many motors were actually produced or whether its production came close to the number of motors for which it had ready customers. Hence, the Respondent argues, it had no reason to hire more than a few of the former strikers, and the judge's conclusions to the contrary simply reflect a misunderstanding of its corporate goals.

We find the Respondent's claims belied by testimony of the Respondent's own witnesses and the credited testimony concerning Plant Manager DeFalco's explanation to employees in September 1986 about his hiring plans. We acknowledge that the Respondent was concerned about product quality and had been redesigning its production processes to make employees into more efficient producers. But the record evidence does not show that, as a consequence of that redesign and the concern with quality, the Respondent became indifferent to the number of motors it produced, nor does it show that the number of employees on the payroll was totally unrelated to the number of motors it could produce.

Thus, William Chapman, the Respondent's president, agreed that, in view of the substantial investment in new equipment at the Calhoun plant, he hoped to use that ''capacity to its fullest.'' Jim Hayes, the plant engineer, testified that one of the important goals of changes in the production process was ''to increase production,'' i.e., to ''produce a much larger number of units.'' To be sure, as Hayes testified, the improvements made it possible to get the same amount of production with fewer employees than needed in the past. Those improvements do not, however, explain the failure to hire strikers in greater numbers, given the evidence of the low production figures and Plant Manager DeFalco's admission to employee Nancy Cochran that he could ''sell all the V-8's that he could get'' but that this would require ''upping production and he couldn't get the people right now.''[41] The Respondent's claims are especially unpersuasive with regard to the failure to hire during the winter of 1986–1987, because, as the testimony of several of the Respondent's witnesses indicated, that season was when production for the Respondent's busiest sales period—February through May—was needed.

Finally, we note that there is no evidence that the unrecalled strikers would be less able than those in the 1986–1987 work force to fit into the new, more efficient and quality-enhancing processes. As Plant Engineer Hayes testified, the production process modifications ''did not change what the operator had to do'' but made it possible for an operator ''to make more

1987 a team of engineers from other plants ran the model change. The Respondent provided total employee figures for the first 8 months of 1987 and there were no significant increases in any one month. The lowest number was 156 in May, the highest number was 171 in August, the remaining months showed numbers in the high 150s or low 160s.

[38] The record shows that only 3 members of the team left at the end of January, 2 more left early in February, while 10 remained for almost all of February and 6 did not leave until towards the middle of March, the last 3 leaving on March 14.

[39] We have previously found that an employer's preference for strangers over tested and competent employees is sufficient basis for inferring antiunion motivation. *Laidlaw Corp.*, 171 NLRB 1366, 1369 fn. 14 (1968), enfd. 414 F.2d 99 (7th Cir. 1969), cert. denied 397 U.S. 920 (1970).

[40] The Respondent asserts that it is privileged to hire more replacements than it has strikers citing *Kurz-Kasch, Inc.*, 286 NLRB 1343 (1987), remanded 865 F.2d 757 (6th Cir. 1989), and *Atlantic Creosoting Co.*, 242 NLRB 192 (1979). The Respondent's reliance on these cases is misplaced. In *Kurz-Kasch*, the only issue with respect to the hire of excess replacements was whether they constituted bona fide replacements. 286 NLRB at 1360. In *Atlantic Creosoting*, the General Counsel argued that the respondent was acting pursuant to an unlawful plan to defeat the strikers' right to immediate reinstatement by hiring excess replacements. However, the judge found a lack of substantial evidence in the record to support such a contention. 242 NLRB at 199. The Board adopted this finding by specifically noting ''that Respondent, without unlawful motive, permanently replaced approximately 62 striking employees with 80 laborers'' 242 NLRB at 193. By contrast, as explained above, we find that the record considered as a whole clearly demonstrates the Respondent's unlawful motivation in hiring excess replacements during the January 1986 strike.

[41] According to Ron Jensen, who was manager of the Calhoun plant before DeFalco, Calhoun was the Respondent's primary producer of V8 motors.

engines'' by having parts and tools more readily available to the operator.

In sum, in rejecting the Respondent's proffered business justification for the snail's pace at which it recalled the strikers, the judge did not exhibit a ''total disregard of plausible economic explanations,''[42] as the Respondent contends. Rather he found, as we do, that the Respondent's explanations are undermined by the evidence, including that furnished by its own witnesses. We thus agree with the judge that the Respondent has not rebutted the evidence indicating that its purpose in delaying recalls of strikers was to destroy employee support for the Union.

I. *Allegations Concerning the Respondent's Failure to Recall Strikers to Substantially Equivalent Positions*

The judge found that the Respondent did not satisfy its *Laidlaw*[43] obligations and that it engaged in discriminatory conduct against the strikers in violation of Section 8(a)(3) and (1) of the Act. Among other things, the judge found that the Respondent unlawfully failed to offer substantially equivalent positions to strikers by (1) recalling labor grade 4 strikers to labor grade 3 jobs without notifying them of their rights to labor grade 4 positions, and (2) recalling labor grade 3 strikers to particular labor grade 3 jobs that were different from those they had formerly held. For the reasons stated below, we reject the Respondent's exceptions concerning the labor grade 4 employees, but we find merit in its exception to the judge's finding that all labor grade 3 jobs were not substantially equivalent for the purpose of reinstatement offers.

1. Reinstatement offers to labor grade 4 employees

The record shows, and the judge found, that the Respondent offered labor grade 4 strikers positions as grade 3 assemblers, and posted and accepted bids on grade 4 positions without either offering the positions to grade 4 strikers or allowing them to bid on the positions. In its exceptions, the Respondent does not contend that labor grade 3 positions are substantially equivalent to labor grade 4 positions, nor does it deny that it recalled labor grade 4 employees to labor grade 3 positions. It argues that its offer of labor grade 3 positions was without prejudice to the strikers' rights to grade 4 jobs and that they were retained on the recall list whether or not they accepted or declined grade 3 positions. It also contends that when grade 4 jobs opened up, the Respondent resorted first to the recall list to fill them.

We find no merit to the Respondent's exceptions because the record indicates (1) that these strikers were not informed that the Respondent acknowledged their rights to grade 4 positions and (2) that the Respondent had posted grade 4 positions in the plant without notifying unrecalled grade 4 strikers about them.

Mark Wesley testified that he received an August 15, 1986 offer as a grade 3 assembler despite his prestrike position as a grade 4 motor tester. Wesley returned and remained at the plant for approximately 12 months in grade 3 positions. The Respondent did not indicate that he remained eligible for a grade 4 vacancy. About a week before Wesley's departure for a new job at Lockheed Aircraft, Employee Relations Manager John Stoy told him he had been going through his file and noted that Wesley had been a grade 4 motor tester before the strike but Stoy did not know what that meant. Similarly Michael Davis testified that Stoy called him about openings at the plant in August 1986. Davis indicated that he would return, and spent approximately 1 year in grade 3 positions before being placed back in his prestrike job of grade 4 motor tester. At no time did Stoy say anything about a grade 4 position.

Gloria Boyd testified that Stoy called her in July 1986 to return to work. No mention was made of her prestrike grade 4 inspecting position; and it was not until August 1987, the month when the consolidated unfair labor practice complaint was issued in this case, that Stoy told her that if a position similar to her former grade 4 position became available, it would be offered to her prior to any posting for bids.

Richard Hutchins stated that he received an April 20, 1987 written offer as a grade 3 assembler even though he indicated on his January 23, 1986 form for preferential hiring that he was only interested in returning to his prestrike labor grade 4 position. The letter stated: ''If we don't hear from you by five calendar days from the date of receipt we will assume that you are not interested in returning to OMC and our records will reflect that you voluntarily resigned as of that date.'' Hutchins testified that the Respondent never indicated that he was eligible for a grade 4 position.

The Respondent's claim that it offered the former grade 4 strikers any open grade 4 positions before offering those positions to other employees without such experience is belied by the testimony of Employee Relations Manager John Stoy. He admitted that no labor grade 4 bid was opened to employees on the preferential hiring list during 1986 and the first 7 months of 1987. For example, an April 23, 1986 bid for a labor grade 4 repair person in ''powerhead'' and a May 8, 1986, bid for a labor grade 4 painter in ''lower unit'' were merely posted in the plant and employees transferred from within the plant. The Respondent followed this procedure for all the other bids occurring

[42] *Bushnell's Kitchens*, 222 NLRB 110, 118 (1976).

[43] *Laidlaw Corp.*, 171 NLRB 1366 (1968), enfd. 414 F.2d 99 (7th Cir. 1969), cert. denied 397 U.S. 920 (1970).

during this time. First notification to employees on the preferential hiring list occurred when the Respondent mailed letters concerning an August 12, 1987 labor grade 4 paint vacancy. Taken as a whole, the Respondent's treatment of the labor grade 4 strikers as to their recalls failed to satisfy the statutory obligation to reinstate strikers to substantially equivalent positions.[44]

2. Reinstatement offers to labor grade 3 employees

We disagree with the judge's finding that the various different jobs in the labor grade 3 classifications were not substantially equivalent for reinstatement purposes. He gave insufficient weight to similarities among those positions and, more significantly, he disregarded the evidence of frequent transfers among those positions prior to the strike (described in sec. F, above, concerning the labor pool policy). The evidence shows, as the Respondent contends in its exceptions, that although variances in the jobs caused some employees to prefer one job over another, these were fundamentally equivalent low-skilled positions.

Both the General Counsel and the Respondent elicited substantial testimony on the nature of the work performed by employees in labor grade 3 positions. They worked under uniform conditions with the same benefits and pay (leadpersons received an extra 25 cents an hour). Plant Manager Sam DeFalco indicated that almost all stations in the plant involved repetitive manual work in cycles of approximately 5 minutes. Employees often used simple air tools to attach parts and at some stations were required to wash, grease, or sand the motors. In the powerhead department, employees attached and adjusted parts (e.g., carburetors, starters, electrical components) to the exterior portion of the engine. In the lower unit department, they attached the mid section to the gear case. In the hookup department, they attached the assembled powerhead to the assembled lower unit. In the shine line department, they washed the motors, adding decals, greasing fittings, attaching an air silencer, and attaching the motor hood. In the motor cover department, they attached handlers, louvers, and decals to the motor cover, inspected the motor cover and placed it in a plastic bag. In the paint department, labor grade 3 employees wiped off parts and cleaned glue and grime from the motors. In the pack department, employees assembled the owner's manual, small parts kit, and boxes; employees constructed an H-frame of wood and cardboard and a cardboard box for each motor and a conveyor brought the boxes to the rollover stand where employees bolted the motor into the H-frame and packed it into the box; a hyster moved the packed motor from the rollover stand to the reader rail, where employees added the owner's kit and sealed the boxes.

DeFalco testified that none of the plant's positions in labor grade 3 required specific skills. Rather, employees needed to become accustomed to the rhythm of accomplishing the job; they learned to be comfortable with the sequence. Most employees could become proficient at producing a quality product within 4 to 8 hours; employees usually attained the rhythm which made the job easier for them within the same period or an additional half day. Most employees (99.9 percent) were able to perform at the desired level of 75-percent standard within 1 to 3 days, according to DeFalco.

The employees themselves brought no special skills to the positions at the plant. Some had attended a 2-day ''quick start'' program conducted by the local unemployment office. This program offered a history of the Company and taught parts identification and use of air tools and screwdrivers. Employees had no technical training or prior assembly experience. Some had no high school diploma and had worked previously in unskilled food service jobs.

Even more significantly, as set out in section F, above, even before the strike these jobs were treated as relatively interchangeable in that employees were not infrequently transferred among them. There was no clear practice of keeping every employee immutably fixed in a single given position.

The testimony of individual employees on which the General Counsel relies indicates that employees had clear preferences among the jobs, but does not rebut the foregoing evidence. Thus, Evelyn King unfavorably compared her poststrike shine line position, in which she washed, torqued, and greased motors, with her prestrike inspection position, because in the shine line position she had to wear rubber shoes, gloves, and apron and could no longer wear her best clothes, and the work seemed ''a lot harder.'' Suzi Suggs testified that she preferred her prestrike parts chasing job to her poststrike reader rail position because the latter was ''constant action all the time,'' whereas with her former job, ''you could get caught up and still feel like you were on easy street or taking it easy.'' Nancy Cochran testified about the undesirable features of various jobs: for example, the difficulty, in the hookup station job, of inserting screws by air gun without being hit by the motor; the ''slippery . . . nasty'' work of oiling cure cases in another position; the vulnerability to spattered paint sludge in the sanding operation; and the problem of itchy skin caused by handling raw fiber glass in the process of building motor covers. Some similar complaints were voiced by Reba

[44] See *Oregon Steel Mills*, 291 NLRB 185 fn. 1 (1988), enfd. mem. 134 LRRM 2432 (9th Cir. 1989), cert. denied 110 S.Ct. 2617 (1990); *H. & F. Binch Co.*, 188 NLRB 720, 725 (1971), modified on other grounds 456 F.2d 357 (2d Cir. 1972); *MCC Pacific Valves*, 244 NLRB 931, 933–934 (1979), modified on other grounds mem. 665 F.2d 1053 (9th Cir. 1981).

Cook, who particularly disliked her poststrike job in powerhead, because ''you need to be fast with your hands'' to manipulate the air gun as the motors roll down, and, as in the shine line and paint departments, there was exposure to chemicals.

In contrast to Cook's testimony about the undesirability of the powerhead position, Phyllis McClure testified that she preferred her prestrike assembly job in powerhead to her poststrike job at the de-gas station, which she criticized because of exposure to cleaning chemicals and gas fumes. Similarly Debbie Bowman expressed a preference for her prestrike hook-up position (comparing it unfavorably with her poststrike shine line position, which she felt imposed ''a whole lot more pressure'' and left her with wet arms despite protective clothing); while Jack Holland wished to leave his poststrike hook-up position for his prestrike boxmaking job in the pack department, even though he conceded that his old job ''hurts your hands, paralyze[s] your arms . . . and you never get used to it.''

In short, the evidence indicates that the jobs differed in ways that caused employees to prefer one over another (although the preferences were not all the same), but that they were substantially equivalent in skill level and compensation and had been treated as interchangeable before the strike.[45] Thus, when, in the course of following the recall procedure requested by the Union,[46] the Respondent offered some of the employees labor grade 3 positions, as they became available, that were different from the jobs the employees had occupied before the strike, the Respondent satisfied its *Laidlaw* obligation of offering them substantially equivalent employment. We find, therefore, that the Respondent committed no violation of the Act when it offered labor grade 3 assembler positions to those strikers who had held labor grade 3 positions prior to the strike.[47]

[45] Because we are relying in part on the evidence of prior, frequent interjob transfers within labor grade 3, our holding here should not be construed as precedent for finding that jobs with physically different requirements will always be regarded as substantially equivalent if they are unskilled and compensated at the same level.

[46] A number of the permanent replacements, when hired, had signed slips acknowledging that they were permanently replacing an employee with a particular clock number. The Union asked that when such a replacement departed, the striker with that clock number be recalled. Because a given replacement was not necessarily working in that striker's former prestrike position when he or she departed, however, the recalled striker's former position would not necessarily be open at that point.

[47] We are mindful that our holding here may necessitate some changes in the designated employees owed backpay by the Respondent. We believe precision in this matter is best undertaken in the compliance stage of this proceeding. See *Viola Industries*, 286 NLRB 306, 308 fn. 10 (1987).

J. *The Named Discriminatees*

The judge found that the Respondent violated Section 8(a)(3) and (1) of the Act by issuing disciplinary warnings to returned strikers Patty Densmore, Faye Parker, Jerry Holcomb, and James Bold, and to Connie Davis, who aligned herself with the returned strikers,[48] and by discharging Bold.[49] We agree. In concluding that the General Counsel has established a prima facie case of discrimination under *Wright Line*,[50] we rely specifically on the evidence that the penalties imposed on these strikers and on the striker sympathizer constituted disparate treatment when compared with the Respondent's prestrike policies. In each case, the discipline (and, in Bold's case, the discharge) stemmed from alleged poor performance in jobs with which the employees were unfamiliar, and it was imposed after the Respondent had refused the employees' requests to return to other jobs that they were capable of performing up to standard. Although, as explained in section I, above, the labor grade 3 jobs were substantially equivalent and no employee had an inalienable right to a particular position, testimony credited by the judge establishes that, in the past, when employees had failed to meet production standards, they had been moved to other jobs to which they were better suited and they were not disciplined for their failure.

The record shows that Davis was an experienced employee who had always spoken openly with her supervisors about her work assignments. On July 16,

[48] Davis testified that on the Friday before the Monday of striker and union activist Reba Cook's return to the plant in April 1987, she was approached by Production Manager Ronald Tetzlaff and told that he wanted Davis ''to take no bullshit'' and ''work her ass off,'' with reference to Cook. Shortly after Cook's return, employee Jerry Holt loudly asked Cook whether ''she'd painted any houses or laid any tacks lately'' in the hearing of many employees. Davis reported this incident to her supervisor, Jim Gayheart, complaining about the atmosphere of harassment. Thereafter Holt again harassed Cook about her union support by placing at her workstation an enlarged copy of the Respondent's nonunion policy. Supervisor Todd Nicholas intervened in this incident and assured Davis, who continued to express consternation about the harassment of the returned strikers, that he would take care of it. Supervisor Greg Free also intervened, advising Davis: ''let me give you a warning. You need to be careful . . . . There are some people upstairs that are thinking that you're being swayed by the Union.'' Davis received similar advice from Tetzlaff, who told her he had reason to believe she was ''being swayed towards the Union'' and admonished her: ''A word to the wise. Let me give you a warning.'' The judge's finding that Davis aligned herself with the strikers is based on this specifically credited testimony. Thus we find without merit the Respondent's assertion that the evidence of the Respondent's animus towards Davis was minimal. We are also unpersuaded that the passage of approximately 2 months between the incidents recounted by Davis and Davis' discriminatory warning warrants a contrary conclusion.

[49] The Respondent recalled these strikers in 1987—Parker on April 30, Holcomb on May 6, Densmore on May 17, and Bold on August 17.

[50] *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981); approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

1987, Supervisor Todd Nicholas reassigned the employees on the 2-cylinder rope and the 2-cylinder electric motor lines. Davis was moved from first position rope to second position electric. This new position was demanding and Davis protested about her assignment. She failed to meet the required 75-percent standard which was 10 motors per day on the first 2 days. Plant Engineers Jim Hays and David Burns monitored Davis on the second day at the end of which she was summoned to the office. In the presence of Employee Relations Manager John Stoy, Supervisor Nicholas issued a written reprimand for poor performance. Davis had never before been disciplined and she had received no prior oral counseling about this incident.

Densmore was another experienced employee who was a leadperson on the 2-cylinder line in powerhead prior to the strike. The Respondent placed her on the V8 line when she returned to the plant. She was required to build one of the large V8 motors by herself every 70 minutes. Densmore encountered difficulties immediately not only with the demands of the position but also with obtaining parts. She repeatedly requested to be returned to her former position but these requests were denied. Plant Engineer David Burns made a timestudy of her movements and Supervisor Greg Free made some effort to see that the parts chaser had complete kits for Densmore. On July 16, 1987, Supervisor Free issued Densmore a written warning for unacceptable job performance because she had been at the station for 8 weeks and was only making 60 percent rather than 75 percent of standard. The Respondent had never before disciplined Densmore. Rather, the Respondent had always praised her for her reliability and ability to instruct others.

Prior to the strike, Parker was on the shine line (washing, polishing, attaching decals to the motors) and Holcomb was a grade 4 tester. When they returned to the plant, the Respondent assigned them to the two person, boxmaking position in the pack department. No woman had worked in this position before Parker's assignment. The pair immediately experienced difficulties in meeting the required 75 percent of standard and notified Supervisor Brian Harrison of problems encountered with the materials and the configuration of the workstation, and also asked to be moved to other positions. Harrison and plant engineers attempted to rectify some of these problems, but Parker and Holcomb continued to encounter difficulties in meeting the standard. After approximately 2 weeks in the position, the Respondent issued written warnings and about a month later final written warnings for poor work performance.

Bold held the boxmaking position in the pack department prior to the strike. The Respondent placed him in powerhead working on subassembly making carburetors and VROs on his return. Unlike the physical requirements of the boxmaking job, this position required fine motor skills because of the manipulation of small parts. Bold immediately encountered difficulty in making standard. Plant Engineer Terry Stewart conducted a timestudy. He found that Bold was having ''a lot of trouble in actually physically handling the parts. Especially some of the smaller parts . . . just fumbling with them.'' After about 1 week, the Respondent issued Bold a written warning for poor performance. Plant Engineer David Burns conducted another timestudy. He also found that Bold was fumbling with the straps and clamps. Two days after the first warning, Bold received a second warning for unacceptable performance and quality. Two days after that, the Respondent terminated Bold. Bold had asked to return to pack during this time, but the Respondent claimed there were no vacancies.

Densmore testified that Supervisor Greg Free stated that only one person, Tommy Smith, had ever met the production standard on the V8 line. Davis testified that employees usually had a week or two to get used to a new position and when ''they seen [sic] that you couldn't do it, then you was [sic] placed somewhere else where you might be able to do it.'' She herself had worked the V8 line from the late fall of 1986 until February 1987 and had never consistently made the production goals of 9 or 12 motors daily, sometimes falling as low as 1 or 2 and 3 or 4. Nevertheless, she was never warned or criticized for failing to make production. Similarly, when assigned to 2-cylinder rope after the V8 line, Davis made only about 30 percent of production on the first 2 days but was not criticized or warned. Hurt testified that the 2-cylinder rope line never made daily production until the beginning of October 1987. Then employees met the goal twice successively, but afterwards failed. Operators on one particular station changed frequently because of failure to meet standard, and one, Patsy Ledford, took at least a month to meet standard. Although the Respondent criticized these operators, it did not issue written warnings and merely moved them to other work stations. Similarly, prior to the strike, Marilyn Wilson was not able to handle the 3-cylinder line and was moved to subassemblies, and then to the shine line, without discipline. Strike replacement Terry Steele could not handle a position on the 2-cylinder electric motor line and was moved to subassemblies and then 3-cylinder motor line, without discipline.

In sum, although Davis, Densmore, Parker, Holcomb, and Bold were not necessarily entitled to be placed in their old prestrike positions when they were recalled, the discipline imposed on them for the problems they encountered in their new positions represented a punitive policy that differed from that applied before the employees had exercised their Section 7 right to strike.

When they immediately encountered difficulties in making standard in these positions, the Respondent failed to follow its past practice of reassigning them to positions to which they were better suited. Similarly, after Davis openly sided with the returned strikers, she too was placed in a new position and was subjected to the same treatment. The Respondent pressured these five employees to meet production standards and issued disciplinary warnings and ultimately terminated Bold.

The Respondent presented much evidence and argues at length in its brief that all of these employees were disciplined for cause. However, this contention is unresponsive to the Respondent's burden to justify the disparate treatment of Davis, Densmore, Parker, Holcomb, and Bold. Accordingly, like the judge, we find that the Respondent violated Section 8(a)(3) and (1) of the Act by issuing written warnings to the five named employees and by discharging Bold.[51]

AMENDED REMEDY

The judge included in his order the affirmative requirements that the Respondent treat the initial year of the Union's certification as beginning on the date of compliance with his order, and, in addition to posting the Board notice, mail copies of the order to all bargaining unit employees and publish it in newspapers of general circulation in the vicinity of the Calhoun plant. The Respondent excepted to these requirements.

We find no merit to the Respondent's exception to extending the certification year. That is a standard remedy where an employer's unlawful conduct precludes appropriate bargaining with the union. See *Mid-South Bottling Co.*, 287 NLRB 1333, 1350 (1988), enfd. 876 F.2d 458 (5th Cir. 1989); *R & H Masonry Supply*, 238 NLRB 1044, 1050 (1978), modified 627 F.2d 1013 (9th Cir. 1980). We are mindful that the parties in this proceeding engaged in bargaining and consummated a contract. Nevertheless, the Respondent engaged in multiple and continual violations of the Act in a period extending from the Union's organizing campaign which commenced in late 1984 until after the conclusion of the 1-year contract in January 1987. During this extended time, the Respondent not only violated the statutory rights of its employees directly, with coercive and discriminatory conduct, but also undermined the employees' chosen representative with multiple failures to meet its statutory requirement to bargain in good faith with the Union. In these circumstances, we find appropriate the judge's requirement that the Respondent treat the initial year of union certification as beginning on the date of compliance with our Order. See *Glomac Plastics*, 234 NLRB 1309 fn. 4 (1978), enfd. in pertinent part 592 F.2d 94 (2d Cir. 1979).

On the other hand, we are not persuaded that the Respondent's conduct is so egregious as to warrant the notice mailing and publishing requirement ordered by the judge. Special notice remedies are designed to meet special situations not present in this proceeding. See *Carbonex Coal Co.*, 262 NLRB 1306 (1982). We find merit to the Respondent's exception in this respect and shall delete this requirement from the judge's recommended Order.

ORDER

The National Labor Relations Board orders that the Respondent, Outboard Marine Corporation, Calhoun, Georgia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating its employees concerning their union sympathies and support of the Union or concerning their intent to engage in concerted activities, including but not limited to their engagement in a strike or promising them benefits if they withdraw their support from the Union.

(b) Threatening its employees with discharge, loss of jobs, pay, or benefits, closure of its Calhoun facility, the futility of their support for the Union as Respondent would never sign or agree to a labor agreement, threatening its employees with bad recommendations or never working again in Gordon County, Georgia, if they strike, with a refusal to recall or reinstate them because of their support for the Union as there would not be a union at the Calhoun plant, threatening them with onerous working conditions or unspecified reprisals because of their protected concerted activities.

(c) Refusing to bargain with the Union concerning its initial contract and pretextually asserting an impasse and implementing unilateral changes in wages and benefits without bargaining those changes with the Union.

(d) Refusing to bargain with the Union concerning the training of employees for the peer review grievance procedure and to furnish it with information concerning this matter.

(e) Unilaterally eliminating leadpersons' duties and pay and inspectors and other positions without bargaining these changes with the Union and discriminating

[51] See *Storer Communications*, 287 NLRB 890, 899–900 (1987); *Gilliam Candy Co.*, 282 NLRB 624, 629 (1987); *Baddour, Inc.*, 281 NLRB 546, 563 (1986), enfd. mem. 848 F.2d 193 (6th Cir. 1988). We do not reach the judge's finding that strikers Richard Hutchins and Jack Holland quit because the Respondent assigned them to more arduous positions to which they were ill-suited on their return to the plant. We note that Hutchins and Holland were named neither in the complaint nor in the judge's order. We also note that both Jerry Holcomb and Richard Hutchins retain their *Laidlaw* rights to grade 4 positions. These two employees worked in this classification prior to their striking, but the Respondent offered them grade 3 assembler positions when they returned to the plant. See sec. I,1, above.

against employees with respect to leadperson duties and pay because of their engagement in a strike.

(f) Withdrawing recognition from the Union and unilaterally implementing additional changes in wages and benefits, engaging in direct dealing with its employees thereby bypassing the Union concerning the attendance policy, unilaterally implementing changes in the attendance policy, and inserting an antiunion clause in its personnel manual and removing the union bulletin board and failing and refusing to abide by the terms of its expired labor agreement with the Union, until such time as an agreement is reached or a valid impasse is reached.

(g) Hiring excess replacement employees and refusing and delaying the reinstatement of its striking employees on their unconditional offer to return to work and by failing to return the strikers to their former positions or to substantially equivalent positions as openings occurred in those positions.

(h) Issuing written warnings to its employees because they engage in a strike or other protected concerted activities.

(i) Discharging an employee because he engaged in a strike or other protected concerted activities.

(j) In any other manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them under Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Recognize and, on request, meet and bargain with Laborers' Local Union No. 752 concerning wages and other terms and conditions of employment of the employees in the appropriate unit.

(b) Make the unit employees whole for any loss of wages or benefits, with interest, they may have incurred as a result of the withdrawal of recognition from the Union and refusal to bargain by the Respondent and by reasons of all unilateral changes instituted by the Respondent in their terms and conditions of employment, including but not limited to unilateral changes in wages or benefits, the attendance policy, the changes in leadpersons duties and pay, and the elimination of bargaining unit jobs.

(c) Reinstate the existing terms of the expired labor agreement until it has bargained in good faith with the Union and has reached a new agreement or a valid impasse. Nothing herein shall require the Respondent to rescind any increases or improvements in wages or benefits or new benefits previously granted.

(d) Treat the initial year of union certification as beginning on the date this Order is complied with.

(e) Offer each of the employees who went on strike in January 1986 an opportunity to return to the employee's former position or to a substantially equivalent one, if the former position no longer exists.

(f) Rescind the discriminatory warnings issued to employees Connie Davis, Patty Densmore, Faye Parker, Jerry Holcomb, and James Bold, and expunge any references to their discipline from its files and notify them in writing of this.

(g) Rescind the discharge of James Bold, offer him full reinstatement to his former position or to a substantially equivalent one if his former position no longer exists, with full backpay and benefits with interest, and restore his seniority and expunge any reference to his discharge from its files and notify him in writing of this.

(h) Make whole the employees for all loss of wages and benefits with interest and with full seniority for all losses incurred by Respondent's delay and refusal to reinstate the strikers as found herein and by reason of the other unfair labor practices found herein.

(i) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(j) Post copies of the attached notice marked ''Appendix''[52] on its bulletin boards or designated places where notices to employees are customarily posted at its Calhoun plant. The notice shall be posted by Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(k) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[52] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT interrogate employees concerning their union sympathies and support of the Union or concerning their intent to engage in concerted activities, including but not limited to their engagement in a strike or promising them benefits if they withdraw their support from the Union.

WE WILL NOT threaten employees with discharge, loss of jobs, pay, or benefits, closure of our Calhoun facility, the futility of their support for the Union because we would never sign or agree to a labor agreement, threaten employees with bad recommendations or that they will never work again in Gordon County, Georgia, if they strike, with a refusal to recall or reinstate them because of their support for the Union because there would not be a union at the Calhoun plant, threaten them with onerous working conditions or unspecified reprisals because of their protected concerted activities.

WE WILL NOT refuse to bargain with the Union concerning our initial contract and pretextually assert an impasse and implement unilateral changes in wages and benefits without bargaining those changes with the Union.

WE WILL NOT refuse to bargain with the Union concerning the training of employees for the peer review grievance procedure and to furnish it with information concerning this matter.

WE WILL NOT unilaterally eliminate leadpersons' duties and pay and inspectors and other positions without bargaining these changes with the Union and discriminate against employees with respect to leadperson duties and pay because of their engagement in a strike.

WE WILL NOT withdraw recognition from the Union and unilaterally implement additional changes in wages and benefits, engage in direct dealing with employees thereby bypassing the Union concerning the attendance policy, unilaterally implement changes in the attendance policy, and insert an antiunion clause in our personnel manual and remove the union bulletin board and fail and refuse to abide by the terms of our expired labor agreement with the Union, until such time as an agreement is reached or a valid impasse is reached.

WE WILL NOT hire excess replacement employees and refuse and delay the reinstatement of striking employees on their unconditional offer to return to work and fail to return the strikers to their former positions or to substantially equivalent positions as openings occurred in those positions.

WE WILL NOT issue written warnings to employees because they engage in a strike or other protected concerted activities.

WE WILL NOT discharge an employee because he engaged in a strike or other protected concerted activities.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL recognize and, on request, meet and bargain with Laborers' Local Union No. 752 concerning wages and other terms and conditions of employment of the employees in the appropriate unit.

WE WILL make the unit employees whole for any loss of wages or benefits, with interest, they may have incurred as a result of the withdrawal of recognition from the Union and our refusal to bargain and by reasons of all unilateral changes instituted by us in the terms and conditions of employment, including but not limited to unilateral changes in wages or benefits, the attendance policy, the changes in leadpersons duties and pay, and the elimination of bargaining unit jobs.

WE WILL reinstate the existing terms of the expired labor agreement until we have bargained in good faith with the Union and have reached a new agreement or a valid impasse. Nothing herein shall require us to rescind any increases or improvements in wages or benefits or new benefits previously granted.

WE WILL treat the initial year of union certification as beginning on the date the Board's Order is complied with.

WE WILL offer each of the employees who went on strike in January 1986 an opportunity to return to their former position or to a substantially equivalent one, if the former position no longer exists.

WE WILL rescind the discriminatory warnings issued to employees Connie Davis, Patty Densmore, Faye Parker, Jerry Holcomb, and James Bold, and expunge any references to their discipline from our files and notify them in writing of this.

WE WILL rescind the discharge of James Bold, offer him full reinstatement to his former position or to a substantially equivalent one if his former position no longer exists, with full backpay and benefits with interest, and restore his seniority and expunge any reference to his discharge from our files and notify him in writing of this.

WE WILL make whole the employees for all loss of wages and benefits with interest and with full seniority for all losses incurred because of our delay and refusal

to reinstate the strikers and by reason of the other unfair labor practices found.

OUTBOARD MARINE CORPORATION—CALHOUN

Ellen K. Hampton and *Leslie Unger, Esqs*., for the General Counsel.
John G. Creech, Charles P. Roberts III, and *Michael W. Bishop, Esq*., of Greenville, South Carolina, and *Dennis McArdle, Esq*., of Waukegan, Illinois, for the Respondent.
Howard Henson and *David Crosslin,* of Atlanta, Georgia, for the Charging Party.
Connie Davis, of Adairsville, Georgia, for herself.

DECISION

STATEMENT OF THE CASE

LAWRENCE W. CULLEN, Administrative Law Judge. This case was heard before me on 24 separate days between September 14 and December 10, 1987, at Calhoun, Georgia, pursuant to a consolidated complaint issued by the Regional Director for Region 10 of the National Labor Relations Board (the Board) on August 28, 1987, and is based on charges filed by Laborers' Local Union No. 752 (the Union) and charge filed by Connie Davis, an individual. Specifically, this consolidated case is based on the following charges filed by the Laborers Local Union No. 752 in Case 10–CA–21658 on April 2, 1986, and amended on April 22, 1986; a charge filed in Case 10–CA–22106 filed on October 22, 1986; a charge in Case 10–CA–22293 filed on February 5, 1987; and a charge in Case 10–CA–22643 filed on July 1, 1987, and amended on August 3, 1987, all by Laborers' Local Union No. 752 and is also based on a charge filed in Case 10–CA–22709 on July 27, 1987, by Connie Davis, an individual. An order consolidating cases, a third amended complaint and notice of hearing was issued by the Regional Director for Region 10 of the National Labor Relations Board on August 20, 1987, alleging violations of Section 8(a)(1), (3), and (5) of the National Labor Relations Act. Subsequently, on August 28, 1987, the Regional Director set aside settlement agreements in Case 10–CA–20636 in which complaint had been filed on December 12, 1984, and in Case 10–CA–21564 filed on February 26 and amended on March 11, 1986, by the Laborers' Local Union No. 752. A further order consolidating cases, a fourth amended consolidated complaint and notice of hearing was also issued on August 28, 1987, by the Regional Director for Region 10. Subsequently, Case 10–CA–22827–1, –2 was filed on September 2, 1987, by Laborers' Local Union No. 752 and, subsequently, further amendments of the complaint alleging additional violations of the Act were permitted at the hearing by me. Additionally, pursuant to my direction, the General Counsel filed a written motion to amend the complaint and attached Exhibit 1, setting forth the consolidated complaint as revised to reflect all the amendments at the hearing including those contained in the motion. The Respondent has by its answer as amended at the hearing denied the commission of any violations of the Act. Further, the Respondent has filed affirmative defenses alleging that the earlier settlement agreements entered into between the General Counsel and the Respondent were improperly set aside and that the Regional Director's setting aside of the earlier settlements should be reversed by me and further that the vast majority of the various 8(a)(1) allegations which gave rise to the charges in the settlements are time barred by Section 10(b) of the Act. On the entire record in this proceeding including my observation of the demeanor of the witnesses who testified here, and after due consideration of the positions of the parties and briefs filed by the General Counsel and counsel for Respondent, I make the following

FINDINGS OF FACT AND ANALYSIS[1]

I. THE BUSINESS AND STATUS OF RESPONDENT[2]

The complaint alleges, the Respondent admits, and I find that Respondent is and has been at all times material here a Delaware corporation with an office and place of business located at Calhoun, Georgia, where it engages in the manufacture of outboard motors and that during the past calendar, which period is representative of all times material here, Respondent sold and shipped from its Calhoun, Georgia facility finished products valued in excess of $50,000 directly to customers located outside the State of Georgia and that Respondent is and has been at all times material an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION

The complaint alleges, Respondent admits, and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE APPROPRIATE UNIT

The complaint alleges, Respondent admits, and I find that all production and maintenance employees employed by Respondent at its factory at 100 Marine Drive, Calhoun, Georgia, including all shipping and receiving employees and plant clerical employees, but excluding all office clerical employees, salesmen, professional employees, guards, and supervisors as defined in the Act constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

IV. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

On April 18, 1985, the Union was certified as the collective-bargaining representative for the employees in the above-described unit. In the spring and summer of 1985, the Respondent and the Union engaged in collective bargaining for their first labor agreement. Bargaining continued until on or about January 15, 1986, when the employees of Respondent in the above-described unit concertedly ceased work and engaged in a strike. During the period from January 15 to 22, 1986, the Respondent hired replacements for its employees. On or about January 23, 1986, the strike was terminated and the striking employees unconditionally applied for rein-

[1] All dates are from October 1984 until December 1987 unless otherwise indicated.

[2] The following includes a composite of the credited testimony of the witnesses. To the extent that conflicting testimony is not recited here it has not been credited.

statement. The complaint alleges that the Respondent has since January 23, 1986, failed and refused to reinstate its employees to their positions vacated on the departure of a replacement employee or to positions becoming available in the unit for which they are qualified. Thus the primary issues in this case are concerned with the Respondent's alleged failure to timely offer reinstatement to certain of its employees in violation of their *Laidlaw* rights[3] and allegations that the Respondent intentionally delayed or refused to reinstate the strikers in violation of Section 8(a)(3) and (1) of the Act and various allegations of disparate treatment to strikers who did return with respect to their placement and treatment accorded them in various positions and with respect to the method utilized in reinstating the strikers and with respect to more onerous conditions placed on the strikers and with respect to various alleged threats and discriminatory treatment of the strikers. In addition there are some individual alleged cases of discriminatory discipline including one discharge.

In his letter of August 28, 1987, the Regional Director set aside the settlement agreements in Case 10–CA–20636 filed on December 12, 1984, and Case 10–CA–21564 filed on February 26, 1986, and amended on March 11, 1986, by the Union and thereafter Case 10–CA22827–1, –2 were filed on September 2, 1987, by Laborers' Local Union No. 752 and based thereon and on evidence that developed during the hearing further amendments of the complaint alleging additional violations of Section 8(a)(1), (3), (4), and (5) were permitted at hearing.

It should be noted that the earlier cases set aside with respect to presettlement conduct involved various allegations of Section 8(a)(1) specifically, interrogation and threats issued to the employees and unlawful promises of benefits with respect to their support for the Union.

B. *The Presettlement Conduct*

In making my determinations in this case I initially considered the presettlement conduct which had been disposed of by the agreements in Case 10–CA–20636 filed on December 12, 1984, and in Case 10–CA–21564 filed on February 26, 1986, entered into by the Respondent only for purposes of background and to establish animus. I then considered the complaint allegations of matters after the settlement on their merits. I then considered the presettlement allegations on their merits and made findings violations. I then found that these postsettlement actions do support the Regional Director's actions in revoking the prior settlements entered into by the General Counsel and the Respondent as the Respondent's unlawful campaign to frustrate its employees' Section 7 rights to engage in concerted activities and select a collective-bargaining representative of their own choosing clearly continued unabated as Respondent saw the need to obtain its ends of ridding itself of the Union. I find that despite its entry into two settlement agreements, the Respondent in its determination to rid itself of the Union embarked on whatever course of action it deemed necessary without regard to the Section 7 rights of its employees. Thus it continued to engage in unlawful threats and promises of benefits. Whereas its former plant manager, Florip, had threatened the employees with unspecified reprisals if they continued to geek union representation and with job loss, its new plant manager, DeFalco, also delayed the recall of strikers until April 1987 when the additional charges filed by the Union convinced Respondent that its plan to delay the return of the strikers was no longer viable. In its efforts to punish the strikers, it returned them only grudgingly and treated them as new hires who must prove themselves and met their frustrations with such treatment with indifference and coercive discipline ignoring the realities of matching the returning strikers for jobs which they were suited in the hope that they would become frustrated and resign. With respect to its contractual commitments, and established working conditions, it threw these to the winds as it desired without notice to and in total disregard for the Union as the collective-bargaining representative of the employees. It unlawfully withdrew recognition from the Union despite the existence of extensive unfair labor practices which were committed before and during the period during which a decertification petition was circulated. It has engaged in numerous unilateral changes in the terms and conditions of employment of its employees in total disregard of their collective-bargaining representative and their rights under Section 7 of the Act. Moreover in view of the overall pattern of unlawful activities engaged in by the Respondent during the course of several years, I specifically reject the Respondent's contentions that the unfair labor practices underlying the earlier settlements were so remote in time as to warrant their dismissal.

It is well settled that a Regional Director may revoke a prior settlement of an unfair labor practice complaint or charge and reinstate it in whole or part if an employer violates the terms of a settlement agreement. Here the Respondent clearly violated the terms of the settlement agreements by continuing its course of unlawful conduct to defeat the Union and deny its employees' union representation. Moreover, the original charge may be reinstated notwithstanding the expiration of the 10(b) period. *Norris Concrete Materials*, 282 NLRB 289 (1986). See also *NLRB v. Northern California District Council of Hod Carriers*, 389 F.2d 721 (9th Cir. 1968); *Medline Industries*, 218 NLRB 1404, 1407 (1975), wherein the Board recognized the practice of permitting evidence of presettlement conduct to establish motive of a Respondent's postsettlement conduct as proper. The Board has also given its approval to only a partial set aside of a settlement agreement as a result of postsettlement conduct engaged in by a respondent. In *Davis Electrical Contractors*, 291 NLRB 115, 135 at fn. 32 (1988), this question was specifically addressed by the administrative law judge who found, with Board approval, that the set aside of only a portion of the settlement was proper. See also *Shurtenda Steaks*, 161 NLRB 957 fn. 23 at 968 (1966). The setting aside of only part of a settlement serves to protect against a respondent's benefiting from its noncompliance with terms of a settlement it has entered into and also protects against the waste of resources that would occur if the entire case underlying the settlement, even those matters fully remedied by the settlement agreement, were litigated.

I thus have concluded that the settlement agreements were properly set aside by the Regional Director and that the presettlement complaint allegations were not barred by Section 10(b) of the Act.

[3] *Laidlaw Corp.*, 171 NLRB 1366 (1968).

C. *The 8(a)(1) Allegations Prior to the Representation Election*

A representation election was held on April 10, 1985, at which the bargaining unit employees selected the Union as their collective-bargaining representative. The following alleged violations involve the period prior to the election and the day of the election.

1. The comments of Supervisor Dick Andrews to leadpersons Ty Bramlett and Molly Evans

Leadperson Ty Bramlett testified that toward the end of November 1984 Supervisor Dick Andrews (an admitted supervisor) told him that some members of ''upper management'' suspected that employee Larry Mulkey was talking about a union and they were watching Mulkey ''particularly close to see if they could get anything against his work record.'' Bramlett further testified that later in the same week Supervisor Andrews told Bramlett and leadperson Molly Evans that management was still watching Mulkey particularly close because he ''was talking the strongest about the union to the other employees and that Larry needed to watch his step because the management might find—look at ways to terminate him.'' Evans corroborated Bramlett's testimony and testified that Andrews had told them that Mulkey had better watch his step because members of upper management felt he was the ringleader of the union movement and wanted ''to get rid of him.'' Evans further testified that Andrews had stated that Mulkey was a good employee and that he (Andrews) would hate to lose his work.

Mulkey was discharged by Respondent and charges alleging his termination as unlawful were filed by the Union and a complaint issued thereon in Case 10–CA–20636 which was settled in May 1985. The General Counsel has not sought to reopen the portion of the case dealing with Mulkey's discharge. Neither Bramlett nor Evans engaged in the strike of January 1986 and were still employed by Respondent at the time of the hearing. I credit their testimony which was unrebutted as Andrews did not testify. The Respondent contends that the comments by Andrews were made out of friendly concern and no coercion has been shown as they were made away from the plant in Bramlett's car during a break period.

I find that the comments by Andrews, an admitted supervisor, were inherently coercive as threats of discharge against Mulkey made to employees in the unit because of Mulkey's support of the Union and that Respondent thereby violated Section 8(a)(1) of the Act.

2. The comments of Manufacturing Manager Ronald Tetzlaff to employee Connie Davis

Connie Davis was employed in quality control during the union campaign. She was an outspoken union opponent who told other employees she did not think the Union could help them as a result of her past experience in another State. Davis testified she saw Manufacturing Manager Ronald Tetzlaff (an admitted supervisor) almost daily as she worked for him in quality control during this period. During their conversations the Union was discussed and Tetzlaff asked her how she thought the employees would vote at the upcoming election and whether she thought the Union was strong. Tetzlaff also said that the plant would close if the employees chose union representation and that ''OMC Calhoun will not be union.'' Davis further testified that about once a week until the election Tetzlaff would say that Respondent would close its plant if the Union were selected by the employees and that the employees would not have a job. She further testified that about a month prior to the election an employee asked what would happen if the Union came in and Tetzlaff responded that the plant would close.

Tetzlaff testified that he only discussed the Union with employees in response to their questions concerning what would happen if the Union was selected by the employees and that when asked by employees whether the plant would close because of the Union, he told them:

> [N]o that OMC has operated with unions and that the plant would not close because of a Union coming in. The only reason that OMC has closed a plant or moved a plant, or moved any operation was because of the economic situation. That would be the only reason.

Tetzlaff denied that he had told Davis that the plant would close. He further testified that he had never told the employees that the plant would close if there were a strike but may have responded to employees' questions concerning the effects of a strike by informing them that the Respondent would hire replacements.

I found Connie Davis to be a credible witness who testified in a forthright and straightforward manner and who did not mince words but rather told things as they were in great detail without any attempt to shade her testimony. Respondent suggests in its brief that Davis' perception may have been altered by a warning she received in 1987 and that the above events were over a year old at the time of her testimony. I found, however, that she demonstrated explicit and good recall of the events about which she testified and credit her testimony. Conversely, I found Tetzlaff's responses to the questions propounded to him to be less than explicit. Although Tetzlaff acknowledged that questions had come up concerning the Union he was unable to identify specific topics which had been discussed. As the General Counsel contends in her brief, he also did not rebut the testimony of Davis that he had said that ''OMC Calhoun will not be union.''

Accordingly, I credit the testimony of Davis over that of Tetzlaff and find that he threatened plant closure if the employees selected the Union. This threat was inherently coercive and I find that Respondent violated Section 8(a)(1) of the Act thereby.

3. The alleged threats by alleged Supervisor Grea Free to employee Connie Davis

At the outset Free's supervisory status during this period between March and April 1985 is disputed as the complaint alleges he was a supervisor and the Respondent contends he was not a supervisor until May 1985. Free was employed as a quality assurance analyst from October 1984 until May 1985 when he was promoted to receiving inspection supervisor. Free testified that his duties as an hourly paid quality assurance analyst were to inspect motors for quality and for adherence to engineering standards. Free testified he had no authority to hire or fire employees or to recommend such actions, nor to discipline or evaluate employees, grant raises,

select employees for layoff, request them to work overtime, or schedule vacations. Free was assigned throughout the plant whereas the other quality assurance analysts were assigned to specific locations.

The General Counsel presented the testimony of Connie Davis that shortly after January 1985 Manager Tetzlaff told her she would be reporting to Greg Free and if she had ''any problems to go to Greg first.'' Thereafter Free issued work instructions and orders to Davis and other employees. Davis testified that Free granted time off without checking and assigned overtime and gave employees their paychecks. On one occasion Free ordered employee Faye Parker to leave her job for an hour and a half to meet with Free and a man from Respondent's headquarters in Waukegan, Illinois, and both attempted to persuade Parker to oppose the Union.

I find based on my analysis of the foregoing that Free was a supervisor within the meaning of Section 2(11) of the Act. Furthermore, he was placed in a position by Respondent's management during this period where he could reasonably be viewed as a supervisor and his engagement in antiunion comments as will be discussed infra reflected the antiunion attitude of Respondent and are attributable to Respondent as its agent. *American Door Co*., 181 NLRB 37 (1970); *NLRB v. Des Moines Food*, 296 F.2d 285 (8th Cir. 1961); *Clevenger Logging*, 220 NLRB 768 (1975).

Connie Davis testified that during this period she had frequent contacts with Free prior to the election and that more than once a week Free warned her about adverse consequences if the Union won the election because she could ''float around and talk to people'' as a floor inspector. Free asked her whether ''the Union had a good strong hold in there.'' He also told her to let the employees know that if a union came in, the plant would close. Davis testified that on one occasion Free overheard her and other employees discussing the Union and said, ''you better pray it don't come in . . . because this place is going to close.''

Free denied that he had told the employees that the plant would close if they chose union representation but rather testified that he had told employees that the plant was established to make a profit and that if the Union came in, this would hamper the plant's ability to make a profit. Free also testified he had no preference one way or the other concerning the Union during the election campaign. As the General Counsel contends in her brief Free did not rebut Davis' testimony that he had told her to get other employees know that the plant would close if the Union won the election.

I credit the clear and detailed testimony of Davis over that of Free which impressed me as devoted to walking a thin line between denial of the alleged threats of plant closing and acknowledging that there had been some discussion wherein he had expressed concerns about the adverse impact of the Union on the plant's profitability. I accordingly find that Respondent violated Section 8(a)(1) of the Act by the threats of plant closing made by its agent Greg Free to its employees if they selected the Union as their bargaining representative.

4. The comments of Supervisor Mark Dunn to employees Richard Hutchins, Ray Moore, and Julius Sexton

Hutchins testified that about a month before the election Supervisor Mark Dunn (an admitted supervisor) entered into a discussion with Hutchins and employees Ray Moore and Julius Sexton in the motor repair department and asked the employees to give the new management a chance. Hutchins related the benefits that the employees had received after joining a union at a previous employer of his. Hutching testified that Dunn said the plant would be closed if the Union were voted in. Hutchins further testified that employee Sexton then contended that the plant could not legally be closed and that Dunn replied, ''they can if they show a loss.'' Hutchins testimony was corroborated at the hearing by Moore and Sexton. Moore testified that Dunn said, if the Union won the election, ''they would more than likely move the plant.''

Dunn testified and cast a different emphasis on this conversation. He conceded that the Union was a great topic of interest but could recall no specifics. He also contended that the Respondent did not have a position on the Union. He also testified that when questioned by employees he told them that the only way the plant would close would be if it showed a loss.

I credit the testimony of Hutchins, Sexton, and Moore over that of Dunn. I find that the primary emphasis of Dunn's comments were that the plant would close if the Union won the election and that a way to do so legally would be to show a loss. I accordingly find that Respondent violated Section 8(a)(1) of the Act by the threats of plant closure made by Supervisor Mark Dunn to its employees if they selected union representation.

5. The alleged interrogation of employee Julius Sexton by Supervisor Greg Free

Employee Julius Sexton testified that about the first of April 1985, Greg Free asked him what he thought about the Union and that he replied he was all for it. Free then told Sexton that he opposed the Union and that the new management was good and asked Sexton, ''If you have the assurance that you have a substantial increase in pay and benefits, would you vote against the Union?''

Sexton's testimony was unrebutted and I credit it. I find that the inquiry by Free as to what Sexton thought about the Union coupled with the inquiry whether Sexton would vote against the Union incorporated with a promise of benefit constituted unlawful interrogation by Free and that Respondent thereby violated Section 8(a)(1) of the Act. *Rossmore House*, 269 NLRB 1176 (1984); *Firmco, Inc*., 282 NLRB 653 (1987).

6. The alleged threats of futility of the employees' support for the Union issued by Plant Manager John Florip on the day of the election

Employee Richard Hutchins testified that on election day, Plant Manager John Florip approached him and referred to a ''yes'' patch worn by Hutchins as he was going to vote. Hutchins mentioned getting a contract and Florip replied, ''I believe you'll be negotiating a contract this time next year.

Employee Faye Parker also testified that on election day Florip approached her and noting a ''vote yes'' button she was wearing said, ''So you decided to go that way, huh?'' When Parker responded in the affirmative Florip said, ''Well, I want you to know we'll still be negotiating a year from now.''

Florip testified that the subject of the potential length of negotiations came up frequently. He denied having made the comments attributed to him and indicated a lack of specific recollection of these events. He testified that whenever he was asked whether negotiations could take a month or a year, he simply replied, that ''it certainly could.''

I credit the detailed recollection of Parker and Hutchins whom I found to be credible witnesses. I find that Florip made the comments attributed to him by Hutchins and Parker. I find that Florip threatened these employees on or about April 10, 1985, with the futility of their support of the Union and that Respondent thereby violated Section 8(a)(1) of the Act.

D. *The Alleged 8(a)(1) Violations Occurring Between the Election and the End of the Strike*

1. The comments of alleged Supervisor Steve Fowler to employee Susie Suggs Around November 1, 1985

In September 1985 Production Schedulers Steve Fowler and Robin ''Bo'' Harris were transferred from Respondent's nonexempt payroll to its exempt payroll. At this time Respondent transferred its parts chasers (material handlers) employees from the production to the materials departments and from the immediate supervision of the production supervisors to that of the production schedulers. Susie Suggs, a parts chaser, testified that in September 1985 she was instructed to report to Fowler rather than to Upper Motor Cover Supervisor Betty Adcock as she had in the past and that she continued to report to Fowler until she went on strike in January 1986. Suggs testified that after the change she received her work orders and instructions from Fowler and Adcock thereafter went through Fowler when she wanted Suggs to do something and Fowler would give the order to Suygs. Fowler assigned Suggs overtime. Although Fowler testified he did not decide whether overtime was to be worked, he did decide whether Suggs would be the employee to work overtime. Fowler also exercised discretion with respect to time off and vacation scheduling. He also signed two attendance warnings issued to Suggs on the line for ''General Supervisor'' although he contended they were prepared in personnel. Suggs testified that the attendance problems were the result of problems she encountered as a single parent as the result of the chronic illness of her daughter. Suggs testified that on the first occasion Fowler told her that he was issuing the warning to let her know she had a problem and he would like for her to improve her attendance. On the second occasion he told her he was giving her a final warning. Fowler also had the trappings of a supervisor as he had a desk next to the production supervisor, dressed in more formal clothes than the other employees, and handed out paychecks to the employees.

Fowler is alleged in the complaint to have been a supervisor and to have threatened the employees with the futility of their support for the Union. Fowler answered in the negative to a series of generalized questions propounded by his counsel as to whether he had the authority to hire, fire, promote, or recommend termination of employees, grant vacation time, or issue disciplinary warnings. He did not however rebut the specific detailed testimony of Suggs as set out above. The complaint alleges that he was a supervisor at the time of the alleged violations. The Respondent contends he was not. I find, however, on the basis of the specific testimony of Suggs that Fowler was a supervisor of Respondent within the meaning of Section 2(11) of the Act. Assuming arguendo, that he was not a supervisor, I find that Respondent placed him in a position wherein he would reasonably be viewed as a supervisor by the other employees of Respondent and that his comments as found infra are attributable to Respondent as its agent. *American Door Co*., supra; *NLRB v. Des Moines Food*, supra; *Clevenger Logging*, supra.

Suggs testified that around the first of November 1985, Fowler said that ''he felt sorry for us, that we would never get a contract, and that if we went out on strike, that we would never be back.'' Fowler acknowledged having discussed with Suggs the possibility of a strike but denied that he had told her that the employees would not get a contract and contended that he had told Suggs he did not know what would happen if the employees went on strike.

I credit the clear and straightforward testimony of Suggs who impressed me as a sincere witness who told things as they were with good recall and did not attempt to embellish her testimony for partisan advantage. Conversely, as I recall Fowler's demeanor on the stand as noted by the General Counsel in her brief, Fowler appeared uncomfortable and defensive and his testimony was largely limited to terse denials.

Accordingly, I find that Fowler threatened employees with the futility of their support for the Union and their engagement in a strike and with the loss of their jobs if they went on strike and that Respondent thereby violated Section 8(a)(1) of the Act.

2. The comments of Manager Ronald Tetzlaff to employee Connie Davis in December 1985 about a month before the strike

Davis testified that about a month before the strike, Manager Tetzlaff was asked by an employee what would happen if there were a strike and replied, ''There may not be a plant.'' She testified also that an employee asked what would happen if the employees did not cross the picket line and that Tetzlaff replied, ''You won't have a job if there's a plant left.'' Tetzlaff denied making these comments and testified he only discussed the Union with the employees in answer to their questions and that he responded to employees' questions concerning whether the plant would close as a result of the Union by telling them that Respondent has operated with unions and would not close the plant as a result of the Union's presence and that the only reason for plant closure or movement of operations would be economic.

As set out above I found Davis to be a credible witness and I credit her testimony here also over that of Tetzlaff. I accordingly find that Tetzlaff threatened plant closure and loss of jobs if the employees engaged in a strike and that the Respondent thereby violated Section 8(a)(1) of the Act.

3. The comments of Supervisor George Hutchinson to employee Connie Davis after the election

Davis testified that a few weeks before the strike Supervisor George Hutchinson asked her whether she thought the employees would strike and that he then told her that the plant would be closed if the employees struck and that he further commented that the plant had a lot of space to be converted into a warehouse. Hutchinson acknowledged that

there had been a number of discussions concerning the possibility of a strike from early November to January and that employees asked him what would happen. He denied making any comments other than he did not know whether there would be a strike and that a strike was not necessary. Respondent contends that there could have been no motivation for Hutchinson to have made these comments to Davis because she was opposed to the Union.

I find, however, that Davis' testimony should also be credited here over that of Hutchinson. As in the case of Free's comments to Davis it may be inferred that Hutchinson's comments were intended to be relayed by Davis to other employees. In any event I find that he made these comments as testified to by Davis and I accordingly find that he threatened plant closure and that Respondent thereby violated Section 8(a)(1) of the Act.

4. The comments of Production Manager Terry Fulmer to employee Glenda Sue Purvis

Purvis testified that after the election, Production Manager Terry Fulmer joined her in the breakroom and asked whether she thought the employees would go on strike and commented about an allegedly violent strike that had occurred in South Georgia and told her, ''If we went out on strike at OMC we would have trouble getting jobs in this area, or surrounding areas.'' Purvis then told him she needed her job and Fulmer repeated twice that the employees would have trouble getting jobs. Purvis' testimony stands unrebutted as Fulmer did not testify and I credit it. I accordingly find that Fulmer threatened the employees with job loss if they engaged in a strike and further find that he threatened them with difficulty in obtaining jobs in the immediate and surrounding areas as his comments regarding the difficulty of finding jobs were not premised on economic considerations but rather constituted overt threats that other employers would not hire them as strikers or union supporters. I accordingly find that Fulmer's threats were unlawful and that Respondent thereby violated Section 8(a)(1) of the Act.

5. The comments of Supervisor Howard Gallman to employees Reba Cook and Evelyn King

Employees Reba Cook and Evelyn King testified that in December 1985 Second-Line Supervisor Howard Gallman told them that, ''This company will never give you a contract.'' King then said, ''You've got to be kidding,'' Gallman said he was not kidding and left. I credit the foregoing testimony of Cook and King which stands unrebutted as Gallman did not testify. I accordingly find that Gallman threatened these employees with the futility of their support for the Union and that Respondent thereby violated Section 8(a)(1) of the Act.

6. The alleged promise of benefits by Production Manager Terry Fulmer to Chief Union Steward Ray Moore

Employee Ray Moore who served as Chief Union Steward for the Union testified that on or about December 19, 1985, he was approached by Production Manager Terry Fulmer who brought up the subject of Moore's previous employment as a foreman with another employer. Fulmer put his hand on Moore's shoulder and said, ''Well if you could help me get rid of this Union . . . I'll see that you get a good supervisor's position.'' Moore declined the offer asserting his responsibilities to the other members of the Union and Fulmer then inquired, ''Why don't you give this new management a try? If you'd go in, we could get rid of this Union.'' A portion of Moore's testimony was corroborated by employees Faye Parker and Glenda Sue Purvis who were passing by at the time and saw Fulmer's hand on Moore's shoulder and heard Fulmer tell Moore that the two of them could get rid of the Union.

The foregoing testimony is unrebutted as Fulmer did not testify. I do not find that Moore's testimony must be viewed with suspicion solely because of his position as union steward and the effects of the strike and related events as contended by Respondent in its brief. Moreover, as set out above Moore's testimony was corroborated in critical part by Parker and Purvis and I credit it in its entirety. I accordingly find that Fulmer promised the benefit of a good supervisory position to Moore if he helped Fulmer get rid of the Union and that Respondent thereby violated Section 8(a)(1) of the Act.

7. The alleged threat by Plant Manager John Florip to employee Jack Holland

Employee Jack Holland testified that in early November 1985, he received a letter from Respondent concerning a possible strike. Holland then sent a letter to Respondent wherein he contended there would be no strike if a contract were negotiated. About 10 days after he sent the letter to Respondent, Plant Manager Florip brought up the letter with Holland and commended Holland for standing up for what he believed in but cautioned that ''the reason that the Company was down here to start with is because the labor up there was so high.'' Florip also told Holland that the employees would not get a contract. Holland replied that if there were no contract, ''we walk.'' According to Holland, Florip angrily said, ''If you go on strike, you'll never work in Gordon County again,'' and then left. Florip denied having made this statement, acknowledged that he recalled Holland's letter and the conversation but offered no details as to what had occurred in the conversation.

I credit Holland's specific and detailed testimony over that of Florip. I found Holland to be a credible witness who testified in a forthright manner. Although Florip's manner at the hearing was mild, I am convinced that he made the statements attributed to him by Holland. I accordingly find that Florip threatened the employees with futility concerning their support of the Union by his comment that the employees would not get a contract and that he also threatened the employees with the loss of their jobs and that they would not work in Gordon County, Georgia, if they went on strike and that by each of the foregoing comments by Florip, Respondent thereby violated Section 8(a)(1) of the Act. Based on the sequence of letters and Holland's testimony at the hearing, I find that this incident occurred in December 1985.

8. The comments by Production Manager Terry Fulmer to employee Reba Cook in early January 1986

Employee Reba Cook, a member of the Union's bargaining committee, testified that in early January 1986, Production Manager Terry Fulmer brought up the subject of the

Union during a work-related discussion and asked her how negotiations were going. When Cook replied there was not much progress, Fulmer asked that Respondent be given another chance to which she replied, ''Fool me once, shame on you. Fool me twice, shame on me.'' Fulmer then told her people can change but Cook remained unconvinced and Fulmer then said, ''This Company's not going to give you a contract.''

I credit the foregoing unrebutted testimony of Cook and find that Respondent violated Section 8(a)(1) of the Act by this threat of futility of the employees' support of the Union. I reject Respondent's contention in its brief that the statement was an opinion rather than a threat.

9. The comments of Supervisor Howard Gallman to employee Eunice Darlene Rayburn approximately a week before the strike

Employee Eunice Darlene Rayburn testified that approximately a week before the strike Supervisor Howard Gallman asked her whether she was going on strike. When she replied in the affirmative, he said, ''You'll lose your job, your benefits.'' She replied that she would get another job and he said that the Respondent would give her a ''bad recommendation.'' As Gallman did not testify, the foregoing testimony of Rayburn is unrebutted. I credit Rayburn's testimony and find that Respondent through these comments by its supervisor, Howard Gallman, threatened Rayburn with the loss of her job and benefits and with a bad recommendation to prospective employers and thereby violated Section 8(a)(1) of the Act.

10. The comments of Supervisor George Hutchinson to Employee Eunice Darlene Rayburn approximately a week before the strike

Rayburn testified that her immediate supervisor, George Hutchinson, asked her whether she was going on strike about a week prior to the strike. When she replied that she was, he told her she ''would lose my job and my benefits.'' He also said, ''We're going to get the Union out of the State of Georgia.'' On the day prior to the strike Hutchinson again asked her whether she was going out on strike and after she replied in the affirmative, again told her she would lose her job.

Although at the hearing Hutchinson denied having made these statements, I credit Rayburn whom I found to be a sincere truthful witness who testified with good specific recall and did not seek to embellish her testimony.

I thus find that Respondent violated Section 8(a)(1) of the Act by the foregoing threat of futility as the Respondent would get the Union out of Georgia and the threats of job loss and loss of benefits issued by its supervisor, George Hutchinson.

11. The comments of Supervisor Howard Gallman to employee Rayburn during a telephone conversation on the Friday following the commencement of the strike

Rayburn testified that on the day prior to the strike, she asked Supervisor Howard Gallman to call her if the Respondent started to hire new employees as she was concerned about her family and that Gallman called her on the Friday after the commencement of the strike and told her that Respondent had hired 50 new employees. Rayburn testified she asked Gallman if she would get the same benefits as were then being advertised. Respondent had unilaterally announced increases in wages and benefits which were then being advertised in its search for applicants to replace the striking employees following an alleged impasse in bargaining after which Respondent had announced the increases. Gallman told Rayburn she would get the same benefits as were being advertised and probably would get more, about $8.

I credit the unrebutted testimony of Rayburn as set out above. However, I find that Gallman's comments to Rayburn were merely ostensibly truthful responses to her questions and were not violative of the Act as unlawful promises of benefits. Even assuming that the increases were violative of Section 8(a)(5) as unlawful unilateral acts, Gallman's responses to Rayburn's question at most amounted to technical violations and did not rise to the level of an unfair labor practice and I accordingly find that this allegation should be dismissed.

12. The comments of Supervisor Hutchinson to Rayburn during a telephone conversation on or about January 19, 1986

Rayburn testified that she telephoned her immediate supervisor, Hutchinson, following her conversation with Gallman in order to discuss her return to work. She was initially unable to reach Hutchinson but he returned her call on the Sunday following the commencement of the strike. When she inquired about her return to work, Hutchinson told her he did not think that ''they wanted anyone there with a Union card.'' Hutchinson denied having made any threats. Hutchinson testified Rayburn asked if she still had a job and that he told her he did not know but to speak to John Stoy, the personnel manager the next day. I credit the specific testimony of Rayburn as outlined above. I accordingly find that Respondent violated Section 8(a)(1) of the Act by the comment of its supervisor, Hutchinson, which I find was an unlawful threat of loss of her job issued to Rayburn.

13. The comments of Plant Manager John Florip at the picket line on the third or fourth day of the strike

Chief Union Steward Ray Moore testified that on the third or fourth day of the strike in January 1986, he and employee Richard Hutchins were standing near fire barrels used to keep warm during the cold winter weather and that Plant Manager John Florip was driving through the entrance way to the plant. Florip addressed Moore and commented that it was cold and Moore agreed. At that point Florip said, ''Well its going to be a cold day in hell before you get a contract,'' and then drove away. Moore's testimony was corroborated by employee Richard Hutchins and by International Representative Richard Barnes who was then approaching the picket line. At the hearing Florip denied having made these comments and contended that this was not the type of thing be would do. He also related a separate conversation on the picket line with another employee.

I credit the testimony of Moore as corroborated by Hutchins and Barnes which I find to be specific and believable, I reject Respondent's contention in its brief that the similarity of testimony of Moore, Hutchins, and Barnes regarding these

comments by Florip renders their testimony incredible or shows it to have been fabricated.

Although as noted above, Florip's manner at the hearing was mild, I find that he did make these statements as testified to by Moore, Hutchins, and Barnes and these statements were consistent with earlier comments found to have been made by Florip regarding the futility of the Union's and employees' efforts to reach an agreement with the Respondent. I accordingly find that Respondent through Plant Manager Florip threatened its employees with the futility of their support of the Union as they would not get an agreement and that it thereby violated Section 8(a)(1) of the Act.

E. *The 8(a)(1) Violations Alleged to Have Occurred After the Strike*

1. The comments of alleged Supervisor Bo Harris to employee Evelyn King in February 1986

Employee Evelyn King testified that in February 1986 after the termination of the strike she spoke with Supervisor Bo Harris at a local supermarket who told her not to count on being recalled as the Respondent ''had hired 50 extra employees to replace us.'' King testified that Harris' comments were made in a sarcastic manner and when she inquired of Harris as to how he knew this, Harris stated that he had been told this by Plant Manager Florip. Harris acknowledged having had a conversation with King in the supermarket but denied having discussed the return of the strikers or the Respondent.

As in the case of Production Scheduler Steve Fowler, Production Scheduler Robin ''Bo'' Harris was transferred from Respondent's nonexempt to its exempt payroll in September 1985 and at this time the parts chasers (material handlers) were transferred from the immediate supervision of the production supervisors to the production schedulers. Subsequently Fowler as did Harris reported to Scheduling Supervisor Ron Minnis and parts chasers reported to him. Although Harris did not decide whether overtime would be worked he had the authority to designate which employees would work the overtime. He also prepared the employees' daily schedule and answered questions and dealt with problems raised by the parts chasers. On at least one occasion he also was involved with the discipline and discharge of an employee from beginning to end and signed his termination slip. Harris also had the trappings of a supervisor as he was assigned an office and handed out paychecks. Under all these circumstances, I find that Harris was a supervisor. Assuming arguendo that he was not, I find that Respondent placed him in a position wherein he was given agency status by managements' placement in such a position whereby he was reasonably perceived by employees as having apparent authority as its agent and that his acts are attributable to Respondent, *American Door Co.*, supra; *NLRB v. Des Moines Food*, supra; and *Clevenger Logging*, supra.

I credit the specific testimony of King whom I find to be a credible witness over the terse denials of Harris. I thus find that Respondent violated Section 8(a)(1) of the Act by the issuance of the threat of job loss by Supervisor Harris as set out above.

2. The comments of Supervisor Todd Nicholas in August and October 1986

Todd Nicholas is the son-in-law of Plant Manager Sam DeFalco who had been appointed plant manager in the spring of 1986. Following the strike Nicholas transferred to the Calhoun plant from the Respondent's plant in Kentucky which DeFalco had managed prior to his transfer to the Calhoun plant. Employee Nancy Cochran, one of the few strikers who had been recalled by the summer of 1986, testified that in August 1986 Supervisor Nicholas responded in the affirmative to a question by another employee as to whether a vote was coming up in January (1987). At this time no decertification petition had been circulated. Cochran then stated that the vote would be on a contract. The contract signed after the strike was due to expire in January 1987. Nicholas then said that the vote would be to determine whether the employees ''wanted the Union or not.'' Cochran stated she thought it was hard to decertify[4] the Union and Nicholas responded that it was only necessary to get up a list of the employees and put it to a vote. He further commented that he had taken a survey when he had initially arrived at the plant and did not think that the employees needed a union.

Cochran testified further that in October 1986 a decertification petition was circulated among Respondent's employees and that Nicholas told her it had been presented to Plant Manager DeFalco. Cochran commented that she guessed that this made Nicholas a happy man to which Nicholas agreed. Nicholas then asked her whether she had signed the petition. After she responded in the negative, Nicholas said that Respondent had the list and would know who had or had not signed the petition. At this point he also told Cochran the Union did not exist any longer.

Nicholas denied having made the foregoing comments and contended at the hearing that he had not discussed the Union with his father-in-law, Plant Manager DeFalco, or anyone else prior to the presentation of the petition to DeFalco and that he was unaware of the Respondent's position regarding the Union and would not have asked Cochran whether she signed the petition as he believed that because she was a striker, she would not do so.

I credit the testimony of Cochran which I found to be explicit and believable over the general denials of Nicholas. Moreover, as contended by the General Counsel in its brief, I find the testimony of Nicholas that he had never discussed the Union with anyone, and his alleged lack of knowledge concerning Respondent's position on the Union in the light of all that had transpired in 1986 with the advent of the strike, the signing of the contract, the hire of a large contingency of strike replacement employees, and the return of some strikers to be inherently implausible.

Accordingly, I find that Respondent violated Section 8(a)(1) of the Act by its interrogation of employee Cochran in October 1986 by its supervisor, Todd Nicholas, as this questioning constituted coercive interrogation coupled with an implied threat that Respondent would know which employees had signed the decertification petition *Rossmore House*, 269 NLRB 1174 (1984); *Firmco, Inc.*, 282 NLRB 653 (1987).

[4] The General Counsel's unopposed motion to correct the transcript is granted.

3. The comments of Plant Manager Sam DeFalco during a luncheon meeting held in September 1986

As will be discussed infra, most of the strikers had not been called back until April 1987 or later. Ten strikers were called back in the summer of 1986. Nancy Cochran, a striker who had been returned in August 1986 testified concerning a meeting held in September 1986 which was one of a series of several ''Luncheon with Sam'' meetings wherein Plant Manager Sam DeFalco met informally with various small groups of employees and at which plant issues and employee concerns were discussed. Cochran testified concerning one such meeting in September 1986 which was the first meeting with management which she had attended since her recall.

Cochran testified that at this meeting one of the employees asked DeFalco when the preferential recall list would be over and DeFalco replied, ''in January.'' It should be noted at this point that the contract which had been signed shortly after the termination of the strike was due to expire by its terms in January 1987. DeFalco also stated in answer to another employee's question that none of the other plants was union represented. At this point Cochran asked whether plants ''up north'' were union represented and DeFalco replied that a Johnson plant had 2000 employees but now was down to 600 employees and that its contract was coming up for renewal and he did not think it would be signed. In response to a question concerning whether the Calhoun plant was the only assembly plant in the South, DeFalco said that the Respondent had ''opened one in January, that we knew why but he couldn't say.'' Cochran testified further that DeFalco said he could sell all the V8 motors he could get but this would require an increase in production and ''he couldn't get the people right now.'' Cochran remarked there were ''still some good strikers out of work.'' DeFalco then told the employees in response to a question as to when the strikers would be rehired, that he couldn't hire additional employees at the present but that after the preferential recall list was over, ''He would look at a few but it would be a few. That he understood that some people got caught up in the flow of things.'' In addition during this meeting DeFalco also told the employees that he was unable to give the employees a wage increase ''because we had a third party.'' He also told them he would be there with them each day rather than in Waukegan (Illinois—the headquarters of Respondent) or in a fancy office in Atlanta, Georgia (the Union's office location).

DeFalco was called by Respondent to rebut this testimony by Cochran among other matters. He freely acknowledged the ''Luncheon with Sam'' meetings held in the fall of 1986 but contended that he had always stressed at these meetings that Respondent would comply with the law and use the preferential list in determining the recall of employees. He further contended that he was aware of the permanent nature of the preferential list. He further testified that when he initially arrived at the plant he was unaware of the process by which unions can be decertified and was shocked when a decertification petition was presented to him but that he had prior to that time learned that the Union could be decertified after the expiration of the contract in January. He also denied having had any discussions with anyone concerning decertification prior to his receipt of the petition for decertification.

In addition to DeFalco, Respondent called its employee relations administrative assistant, Retha Moore, to testify concerning the September ''Luncheon with Sam'' meeting and employee Sandra Scott, a nonstriker who had attended several ''Luncheon with Sam'' meetings prior to the September meeting. Moore was questioned only concerning whether DeFalco had said at this meeting that the preferential hiring list would be over in January and testified that DeFalco had not said this. Scott testified that at this meeting DeFalco told the employees, ''he could get all the work we needed and that he could sell them,'' referring to V8's, V6's and all the motors. Scott also testified that DeFalco had discussed the unionized Johnson plant and its reduction in force.

I find that testimony of Cochran concerning the above comments by DeFalco at the ''Luncheon with Sam'' meeting in September 1986 should be credited. I found her testimony to be clear and explicit. I also note she is a current employee and one of the earliest recalled by Respondent in August 1986 and I found her testimony to be a realistic account of what occurred at the meeting whereas I found inconsistencies in DeFalco's testimony concerning his knowledge or lack thereof of the decertification petition and how he moved from a lack of knowledge to one of knowledge by the time the petition was filed without ever having had any discussions concerning the subject of decertification petitions with anyone. I also find the single denial by Moore concerning whether DeFalco had stated that the recall list would be over in January is unconvincing in contrast to Cochran's testimony and in the light of employee Scott's testimony that there was mention of recalling strikers.

Accordingly, I find that Respondent violated Section 8(a)(1) of the Act by the threats issued by its plant manager, DeFalco, at the September ''Luncheon with Sam'' meeting by telling the employees that he could not hire employees at the present although he could sell all the motors he could build and that he would only look at a few strikers in January. These comments were threats that although he could sell all the motors he could build, he would not hire any more employees until the recall list was over in January and that he would then only look at a few thus conveying to the employees that the remaining strikers would not be recalled because of their engagement in the strike. I find that it may be inferred that DeFalco mistakenly believed that Respondent's obligation to recall strikers would end in January. I also find that his comments concerning the reduction of the work force at the unionized plant up North and that he did not think a new contract would be signed with that plant were violative of Section 8(a)(1) of the Act as they conveyed to the employees that their support of the Union would lead to loss of their jobs and was futile as the Respondent would not sign a contract with the Union. I also find comments by DeFalco that other plants were getting raises but that the Calhoun employees would not get one because we had a ''third party'' were designed to promise benefits of increased wages if the employees got rid of the Union. See *Coast Engraving Co.*, 282 NLRB 1236 (1987), and *Brunswick Corp.*, 282 NLRB 794 (1987).

4. The comments of Plant Manager DeFalco at the January 21, 1987 meeting

The Respondent received a decertification petition signed by a majority of the unit employees on October 23 and 24, 1986, and shortly thereafter withdrew recognition from the Union. As set out infra in this decision, I have found that such withdrawal of recognition was violative of Section

8(a)(5) and (1) of the Act. On January 21, 1987, the date of the expiration of the labor agreement signed by the Union and the Respondent in January 1986, Plant Manager DeFalco held a plantwide meeting. Employee Gloria Boyd testified that he announced the expiration of the contract at this meeting and proclaimed that the Calhoun plant was now a union-free plant. He also stated that ''it was going to stay that way for as long as he was there and that he was going to be there for a long time.'' At this meeting he also announced raises and increases in insurance benefits, announced increased production and overtime, and had an employee remove the union bulletin board. Boyd's testimony was corroborated by employees Susie Suggs, Nancy Cochran, and Blaine West and was not denied by DeFalco.

Accordingly, I find that by his comments at this meeting DeFalco threatened the employees that the plant would stay union free and that it was futile to support the Union and that Respondent thereby violated Section 8(a)(1) of the Act.

5. The comments of Manufacturing Manager Ronald Tetzlaff to employee Connie Davis shortly before the recall of employee Reba Cook

As will be discussed in more detail infra, Respondent did not commence to recall substantial numbers of strikers until late April 1987. Reba Cook was a member of the Union's negotiating committee and assumed the role of chief steward for the Union on the resignation of Ray Moore from this position. Cook was recalled on April 27, 1987. Connie Davis testified that about a week prior to the return of Cook, Manufacturing Manager Ronald Tetzlaff approached her at her work station and told Davis he was bringing a striker back the following Monday and needed someone he could trust and was putting the striker on her line. As set out above, Davis was a nonstriker who had openly expressed her opposition to the strike and had openly related her feelings that it would not do any good because of her experience in another State. Davis further testified that Tetzlaff asked, ''You won't take no bullshit off of em, will you?'' Davis replied, ''No, you know me better than that.'' Tetzlaff then asked, ''I can expect you to work her ass off too, can't I?'' Davis told Tetzlaff the striker would ''work as hard as I do.'' Tetzlaff then said, ''I've got that one taken care of'' and left. Davis testified further that a few days later Tetzlaff told her that Reba Cook would be the returning striker and that he wanted Cook in the middle, ''because I want you to work her ass off.'' Davis explained that she was working on a three person line and that, as the first person in the line, Davis could set the pace while the other experienced person on the end would ''literally take the motor out of the person's hands.'' The net result is that, ''You can work their ass off.'' Tetzlaff acknowledged that he had discussed Cook's return with Davis and denied that he had told Davis to ''work her ass off.'' Rather he testified,

> I said I expect her to do the same amount of work that I expect everybody to do out here. I said I expect no more, but I expect or will expect no less. And I said that has to be expected and done out here. And that was the understanding.

I credit Davis' specific and detailed version of these conversations. As the General Counsel contends in her brief, I found the colloquial version of Davis credible as contrasted to the stilted version of Tetzlaff as set out above. Moreover, as there is no evidence that Cook had a prior poor work record and as the initial conversation with Davis did not even specifically mention Cook, I conclude that Tetzlaff was directing Davis to impose more strenuous working conditions on Cook than on other employees. Although Davis testified she did not follow the directions of Tetzlaff in this regard and in fact helped Cook on her return, I nevertheless conclude that Tetzlaff's comments were unlawful directions to Davis to impose more strenuous working conditions on Cook because of her engagement in the strike and that Respondent thereby violated Section 8(a)(1) of the Act.

6. The comments of Tetzlaff to Reba Cook

Cook testified she incurred no problems on her return to work with the exception of two incidents involving employee Jerry Holt who had circulated the decertification petition. On one occasion Holt made adverse comments toward Cook as a union adherent and striker in the lunchroom. On another he placed an enlarged copy of an antiunion policy in Respondent's handbook (which will be treated infra) at Cook's work station. On both occasions Davis protested the conduct of Holt to management. In May 1987, Tetzlaff spoke with Cook and appeared angry with her rather than Holt when Cook told Tetzlaff she had seen Holt place the copy at her workplace. Cook told Tetzlaff she could handle the matter but that it was Davis who was upset about it. To this, Tetzlaff responded, ''It ain't none of Connie's damn business. I'll take care of Connie myself.'' Cook's testimony was unrebutted and I credit it.

I find that Tetzlaff's comments that he would take care of Davis in light of his angry manner exhibited toward Cook and Davis over what was clearly an unprovoked prank by Holt constituted a threat of unspecified reprisal against Davis for her engagement in protected concerted activities in defending her fellow employee from harassment because of her union activities and that Respondent thereby violated Section 8(a)(1) of the Act.

7. The comments of Supervisor Grea Free to Connie Davis regarding her contacts with returned strikers

Connie Davis testified that she and Reba Cook and other returned strikers became friendly and would associate with each other by taking breaks at the same time. Shortly after the threat directed at Davis to Cook by Tetzlaff, Supervisor Greg Free told Davis, ''Connie me and you've been real tight ever since we've been working here together . . . and I wouldn't dare presume to try to tell you who to take breaks with or who to associate with . . . but let me give you a warning . . . you need to be careful . . . there's some people upstairs that are thinking that you're being swayed by the Union.'' I credit Davis' testimony which was unrebutted.

Given the timing of the issuance of this warning shortly after the incident testified to by Cook concerning Tetzlaff's threat against Davis and the nature of the warning itself which I find was inherently coercive, I find that Free threatened Davis with management's concern that she might become a union supporter herself and the possibility of unspecified reprisals by management and I find that by Free's issu-

ance of this threat Respondent violated Section 8(a)(1) of the Act.

8. Tetzlaff's comments to Davis regarding her union affiliation

Davis testified that the morning after Free ''warned'' her, she sought out Tetzlaff and said, ''I understand that maybe you might think I'm being swayed toward the Union'' and that Tetzlaff replied, ''I've got reason to believe it.'' Davis testified she then ''defended'' herself and asked Tetzlaff about Holt. Tetzlaff told her that Holt denied placing the copy at Cook's work station and that he believed Holt notwithstanding Davis' statement that she had seen Holt put up the copy. Davis then told Tetzlaff that some of the employees ''on the line'' wondered if management had put Holt up to this and that Tetzlaff ''just kind of grinned'' and said ''It could be.'' Tetzlaff then interrupted Davis as she was talking and said ''a word to the wise'' and ''let me give you a warning.'' Davis then walked off. Tetzlaff denied that the entire conversation had occurred. I credit Davis' explicit and clear testimony over the general denial of Tetzlaff.

Accordingly, I find that Tetzlaff threatened unspecified reprisals against Davis because of her concerted activities in defending Cook against harassment directed at her because of Cook's engagement in concerted activities and that Respondent thereby violated Section 8(a)(1) of the Act.

9. The comments of Plant Manager DeFalco to returning strikers

In addition to DeFalco's statement in the January 21, 1987 meeting with employees that the plant was union free and would remain so as long as he was there, DeFalco stressed this with other individual strikers on their return. Reba Cook testified that at the time of her return on April 27, 1987, DeFalco told her ''that there was not a union at OMC and there was not going to be a union at OMC.'' Employee striker Scotty Parker testified that on September 10, 1987, when he was returned to work, DeFalco told him, ''there was not a damn union here and there never would be a damn union here.'' DeFalco did not deny having made either statement and Cook's and Scotty Parker's testimony stands unrebutted and credit it.[5]

[5] A note on credibility determinations: As can be noted I have credited the General Counsel's witnesses over those of the Respondent in this decision. I found the General Counsel's witnesses to be specific and detailed in their testimony whereas much of the testimony of Respondent's witnesses, particularly with respect to the 8(a)(1) violations was limited to terse denials. In making my credibility determinations I have relied on demeanor and the content of those conversations and the context in which they took place. I have also noted that considerable weight should be given to current employees in Respondent's employ who testify to matters adversely to Respondent's position. I have also considered Respondent's argument that I should not be swayed by the General Counsel's attempting to parade a multitude of violations before me and that I not conclude that where there is smoke, there is fire. I find, however, that there simply was a litany of violations committed by the Respondent over a period of several years in its unceasing attempts to rid itself of the Union and that there was established a pattern of unlawful activities by Respondent directed toward that end as found here.

F. *The Alleged Unlawful Implementation of Unilateral Changes in Wages and Insurance Benefits on or about January 15 and 21, 1986*

The parties had commenced bargaining for their first labor agreement in May 1985. The Union's negotiating team was led by its chief spokesman, International Representative Richard Barnes, except for a brief period in the fall of 1985 when Barnes was in the Soviet Union and was temporarily replaced by Union Business Representative Howard Henson. The Company's initial chief spokesman was Jim Short from its Waukegan, Illinois headquarters. In August 1985 Jim Miles, a partner in the law firm of Haynesworth, Balwin, Miles, Johnson, Greaves, and Edwards was permanently substituted as chief spokesman for Short during the remaining course of the negotiations. Also present during negotiations as a member of the Union's negotiating committee was Reba Cook. Also during negotiations along with Short and subsequently Miles was Respondent's director of employee relations for manufacturing, Bob Earlie.

At the commencement of negotiations the Respondent proposed and the Union agreed that the language of the labor agreement would be negotiated first and the economic package would be negotiated after the language had been resolved. When Miles took over as chief spokesman in August 1985, he stated that this arrangement was acceptable to him. Although the General Counsel has not alleged surface bargaining in this case to have led to the strike, she does contend that certain of the conduct of Respondent's chief spokesman, Miles, should be reviewed and considered as evidence of Respondent's overall bad-faith bargaining conduct and animus toward the Union. Specifically she points to the unrebutted testimony of Barnes which is corroborated by the testimony of the Union's bargaining committee member, Reba Cook, both of whom I credit in this regard, that in September 1985 shortly before Barnes was scheduled to be out of town on a trip to the Soviet Union, he informed Miles that Howard Henson, a union business agent, would substitute for him during his absence. Barnes asked Miles to take it easy on Henson as he had recently undergone surgery and was ''having a tough time.'' Cook recalled that Barnes had told Miles that Henson had been terribly sick and had had a bout with cancer and was taking medication. Miles agreed to take it easy on Henson. However, at the final 2-day session in September Miles, in contrast to the parties' agreement to defer economics until the contract language was resolved, asked Barnes for an economic proposal although only a few minor language agreements had been reached thus far. Barnes testified that the Union objected to this but ''reluctantly'' agreed to do so, and the Union drafted a complete new contract proposal including economics which was presented to Respondent by Henson at the following session on October 7, 1985, in Barnes' absence. Just prior to lunch on that date, Miles told Henson that Respondent gave raises to all its plants at that time of year and wanted to give the bargaining unit members a 5-percent wage increase effective immediately. Henson testified that he was ''shocked'' and told Miles that he was ''playing games'' and rejected the offer as there were numerous unresolved contractual issues. Miles persisted in his demand and increased the raise to a 5-1/2-percent increase if Henson would sign off on it. Henson told Miles he could do as he pleased but that he would not agree to it. Cook corroborated Henson's

unrebutted testimony and testified that subsequently the Respondent's negotiating committee caucused and on their return Miles told Henson that the Respondent would remain willing to negotiate wages if Henson would sign off on the wage increases. Henson rejected this offer also. Earlie testified that normally Respondent commenced its wage reviews in August. It is undisputed that there had been no mention of an upcoming time of year for wage increases made to Barnes prior to his departure. The Respondent did not further attempt to explore the wage increase with the Union but rather on the next day, posted a notice to all the bargaining unit employees, stating in part, that ''Last night the Company proposed to the Union that your wages be increased across the board by 5.5 percent effective yesterday, October 7, 1985.'' The notice also set out other benefit increases proposed to be implemented by Respondent but stated that the Union had objected to the proposed wage and benefits increases.

From the foregoing the General Counsel contends and I find that the Respondent through its chief spokesman, Miles, was engaging in manipulative conduct and gamesmanship designed to undermine the Union. I further find as contended by the General Counsel that the foregoing is evidence of but one aspect of Respondent's predetermined plans to rid the Calhoun Plant of the Union.

Barnes testified that subsequently at a December 10, 1985 negotiating session, he asked Miles whether the Union would have to strike to get a contract and Miles responded that it looked like the Union would have to strike to get a contract and then related to Barnes that the Respondent had a history of ''caving in'' on prior occasions after the commencement of a strike. Miles acknowledged the conversation and did not specifically deny Barnes' testimony which I credit. At this meeting Miles also asked Barnes to give him a ''final'' proposal that the Respondent could not live without and that he would present it to the management in Waukegan, Illinois, the Respondent's corporate headquarters and try to sell it. The Union presented Respondent with a new contract proposal at a brief meeting held on January 6, 1986. At a subsequent meeting held on January 15, 1986, the Respondent presented the Union with a counterproposal which included changes and modifications from its previous position and offered to discuss additional changes. Miles also offered a new checkoff procedure by which direct bank deposits of dues would eliminate the need for Respondent to be involved as a result of its statement that it did not want to know who were or were not dues paying members, and stated that this proposal was negotiable.

The Union thereafter typed up a new proposal on its word processor and presented it to Miles on that date after midnight. The new proposal contained a number of changes of both major and minor impact. The proposal also contained a modification of the traditional grievance procedure that had been sought by the Union which would limit the utilization of outside union representation in deference to the peer review type of grievance machinery initially proposed by the Respondent on October 7, 1985. The Respondent's initial proposal on peer review had excluded union participation but had subsequently been modified by the Respondent in a written proposal given to the Union on January 14, 1986, the day prior to this meeting. At the time of the presentation of the Union's proposal after midnight on January 15, 1986, Barnes told Miles that he was willing to negotiate all night in order to prevent a strike which had been called by the Union for January 15, 1986, but Miles declined stating that he was too tired to negotiate further and informed Barnes that the parties were at an impasse. Barnes told Miles this was not possible as he had just given Respondent a new proposal and that Respondent had not responded to questions asked by Barnes concerning its proposal. At this point the parties agreed to a new date for another meeting and concluded the meeting.

The Respondent contends that the parties reached a deadlock on the night of January 14, 1986, and that it properly asserted that an impasse existed as bargaining had been ongoing over an 8-month period encompassing 24 sessions and that numerous important issues remained unresolved including the three most critical areas: (1) arbitration, (2) checkoff, and (3) wages. Respondent contends it was deadlocked on arbitration as it had since October 1985 insisted on a concept of peer review whereas the Union initially indicated a willingness to consider peer review in December but by January had reverted to its initial demand for binding arbitration, as shown in the Union's January 6 and 14 proposals whereas the Respondent's January 14 proposal contained a peer review system, and that Barnes did not indicate any willingness to discuss peer review. With respect to checkoff Respondent contends that it was also at an impasse with the Union as the Union had proposed traditional checkoff whereas the Company was adamantly opposed to traditional checkoff as a result of its desire not to have knowledge of whether an employee was or was not a member of the Union. Respondent contends that Barnes at no time indicated a willingness to back off from a traditional checkoff. Respondent also contends that the parties were also at odds on wages as the Union's January 14 proposal remained unchanged from its January 6 proposal on wages and was significantly different from the Respondent's proposal and that Barnes did not indicate any room to move. The Union's proposal called for ''a Labor Grade 3 rate of $7.00 per hour effective January 1, 1986, with gradual progression up to $7.98 on January 1, 1987 and $8.30 on January 1, 1988,'' whereas Respondent's final proposal called for ''a starting rate of $5.82 effective January 5, 1986, ''with progression to $6.08 after 3 months service, $6.35 after 6 months and $6.68 after 9 months.'' Miles testified he told Barnes there was no way the parties were going to get an agreement with the positions the parties were taking and Barnes said that he would have the pickets up at 6 a.m. and the parties agreed to another meeting and left.

Barnes testified that Miles only glanced at the proposal he had given him on January 14 which inadvertently had included the original position of the Union on the traditional grievance arbitration machinery as a result of a problem with the word processor and then told Barnes the parties were at an impasse. The General Counsel, in reliance on Barnes' testimony and the bargaining notes which reflect that Barnes told Miles he did not understand the Respondent's position on checkoff, contends that Barnes sought clarification of the Respondent's verbal proposal of direct bank deposit for checkoff. Thus the General Counsel contends no deadlock existed on this issue.

Similarly the General Counsel contends there was no deadlock with respect to wages as Barnes testified he told Miles there was room for negotiation on this and that he

needed to know what Respondent was proposing for the term of the contract which would impact on the economic proposal. The General Counsel also contends there was movement on the issue of dental coverage in the Union's January 15 proposal. The General Counsel also contends there was no impasse with respect to grievance arbitration as the parties had been presenting alternatives to the position of each other between the Respondent's peer review proposal and the Union's grievance arbitration proposal and that in the last union proposal of January 15 the Union limited the participation of nonemployee union representatives in the early stages of the grievance procedure.

I find that the parties were not at an impasse on January 15 when the Respondent asserted an impasse existed. Rather I find that the evidence is clear that Respondent through its chief spokesman, Miles, sought to declare an impasse as a part of its overall plan to rid itself of the Union.

It is well established that under certain circumstances an impasse may exist between parties during the course of collective bargaining over mandatory subjects of bargaining such as wages, union checkoff, and grievance arbitration as were involved here and that if an impasse is found to exist, the parties are free to assert economic pressure and under such circumstances an employer may implement its preimpasse proposals. However, there must be a valid deadlock to the point where further bargaining at that point is futile. Further the assertion of an impasse must be made in good faith and not be merely designed to frustrate the bargaining process. Moreover the burden of proof is on the party asserting the impasse.

In *NLRB v. Katz*, 369 U.S. 736, 743 (1962), the Supreme Court held:

> an employer's unilateral change in conditions of employment is similarly a violation of Section 8(a)(5), for it is a circumvention of the duty to negotiate which frustrates the objectives of Section 8(a)(5) much as does a flat refusal.

In *Taft Broadcasting*, 163 NLRB 475, 418 (1967), petition for review denied 395 F.2d 622 (D.C. Cir. 1968), the Board held:

> Whether a bargaining impasse exists is a matter of judgment. The bargaining history, the good faith of the parties in negotiations, the importance of the issue, or issues as to which there is disagreement, the contemporaneous understanding of the parties as to the state of the negotiations are all relevant factors to be considered in deciding whether an impasse in bargaining existed.

See also *Roman Iron Works*, 282 NLRB 725 (1987); *D.C. Liquor Wholesalers*, 292 NLRB 1234 (1989); *Old Man's Home of Philadelphia*, 265 NLRB 1632 (1982).

I find that the Respondent's assertion of an impasse was pretextual and was not made in good faith and the unilateral changes made by it pursuant thereto were unlawful. I have reviewed the course of bargaining and the conduct of Respondent in its recall of strikers which will be discussed infra and I am convinced that the assertion of impasse by Miles was a ploy utilized to further Respondent's plan of ridding itself of the Union. Initially, Miles is a seasoned professional, who has negotiated many labor agreements. His action in the fall of 1988 with respect to the immediate raise proposal and the Respondent's next day posting of the Union's rejection of it were clearly intended to undermine the Union during the absence of its chief negotiator, Barnes. I also find that Miles' comments to Barnes in December were designed to encourage the Union to strike. I find that Miles' rush to judgment to declare that the parties were at an impasse on January 15, 1986, was motivated by Respondent's efforts to declare an impasse and to impose increases in wages and benefits in order to quickly attract new hires to replace the employees who went out on strike. Although the hour was admittedly late and conceding that Miles may have indeed been tired, his actions in asserting an impasse although not reviewing the new proposal in detail and his casting aside Barnes' efforts to negotiate were at least premature and the imposition of the unilateral charges in wages and benefits effective January 15, 1986, were precipitous. Thus, under all these circumstances find that the Respondent's assertion of an impasse was premature and was pretextual. The unilateral advertising and implementation of the wage and benefit increases were violations of Section 8(a)(5) and (1) of the Act as no valid impasse existed and were also violative of Section 8(a)(3) and (1) of the Act as they were designed to further Respondent's plan to rid itself of the Union and thus violated the employees' Section 7 rights to join and support a union.

G. *The Alleged Refusal to Bargain with Respect to Training Employees for the Peer Review Appeals Panel*

The General Counsel contends that the Respondent refused to bargain with respect to training employees for the peer review appeals panel. The Respondent contends that the Union waived its right to bargain with respect to this issue by the withdrawal of an earlier demand over this issue, its acceptance of the Respondent's demand and its agreement to an initial labor agreement which contained a zipper clause. On approximately October 7, 1988, the Respondent proposed a ''peer review'' procedure in lieu of a traditional grievance/arbitration procedure. The peer review procedure excluded the Union from the entire process and designated the plant manager as having final authority. As the Union's chief spokesman, Barnes, was not present during the negotiations in October, he initially discussed the peer review proposal with Respondent's chief spokesman Miles in November. Barnes testified he asked a number of questions of Miles concerning the peer review procedure and remarked, ''I guess you're going to train them too,'' to which Miles replied in the affirmative. Barnes further testified that Miles told him that the employees would have to be trained after hours. Barnes then asked Miles whether he would object to Barnes' coming into the plant to participate in the training and Miles told him I think we can work that out. Miles testified he replied ''that is correct'' to Barnes inquiry whether Respondent was going to train the employees but did not specifically address Barnes' further testimony that he had made the further inquiry concerning whether Barnes could enter the plant to participate in the training to which Miles had replied I think we can work that out. As this testimony of Barnes was not specifically rebutted by Miles credit it. The General Counsel contends and the record supports that there was no other mention during negotiations of the exclusion of the Union from the training process. Barnes testified

without rebuttal that he informed Respondent at this meeting that union participation would be essential to its agreement to a peer review program. On November 19, 1985, the Union submitted a written proposal containing a method of peer review which provided for joint training for members of the employee panel. This proposal was rejected by the Respondent. On January 6, 1986, the Union proposed a traditional arbitration grievance procedure (G.C. Exh. 75) and on January 15, 1986, it proposed an arbitration/grievance procedure which excluded nonemployee representatives from the union grievance committee at the initial stages of the grievance procedure (G.C. Exh. 76). Both the January 6 and 15 proposals were silent on the subject of appeals panel training. The parties adopted the January 14[6] peer review system proposal of the Respondent when they entered into an agreement on January 21. This proposal is silent on the subject of who will train the employees. The contract also contained a zipper clause. Shortly after the execution of the contract Union Business Representative Barnes made two letter demands to discuss the joint training of the employees for the peer review panel which demands were ignored by the Respondent's plant manager. Thereafter subsequent attempts by the Union to discuss or obtain information concerning the training of employees for the peer review panel were also ignored.

Analysis

As set out above, I have credited Barnes that the Respondent through its agent, Miles, had at the November meeting indicated that ''we can work that out'' in relation to the Union's request for participation in training. Although the Respondent rejected the December peer review proposal of the Union which included joint training of employees for the peer review panel and included arbitration and, although the Union's subsequent proposal of January 15 of binding arbitration was rejected by the Respondent, the Respondent's proposal ultimately included in the agreement entered into by the parties is silent concerning who will conduct the training. Thus, there was no express waiver of the Union's right to bargain concerning participation in the training of employees to serve on the peer review panel. I find that the Board's decision in *Public Service Electric Co*., 269 NLRB 467, 468 (1984), relied on by Respondent in its brief is distinguishable from the instant case. In *Public Service* the Board found that a new contract executed by the Union contained a provision which specifically excluded retroactively of a wage increase voiding a prior contract clause which had permitted retroactively and held that the Union had thus bargained away its claim to retroactively. Similarly, I also find *Saint Mary's Hospital*, 260 NLRB 1237 (1982), cited by Respondent is distinguishable on its facts, as among other things, that case involved the Employer's rejection of an entire proposal for a dental plan whereas in the instant case the joint training of employees was but one aspect of peer review which was not covered in the clause. Rather I find the case of *Collateral Control Corp*., 288 NLRB 308 (1988), cited by the General Counsel is in point as the Board in that case rejected the Employer's reliance on generalized language concerning the Respondent's rights to discretion as to the number of guards it would employ and the existence of a broad zipper clause in a labor agreement as justification for concluding that the Union had waived its right to bargaining on subcontracting work. The Board said, ''To establish waiver of a statutory right, that right must be clearly and unmistakably relinquished'' and ''a merely plausible reading does not meet the clear and unmistakable standard.'' In sum I find that the Union did not expressly waive its right to bargaining concerning the training of employees for the peer review panel and that in the absence of an express waiver, waiver may not be inferred even if said inference might appear plausible under the circumstances. I thus find that Respondent violated Section 8(a)(5) and (1) of the Act after the execution of the labor agreement when it ignored the Union's request to bargain concerning the training.

H. *The Alleged Unilateral Changes in Leadperson Duties and Pay*

The General Counsel introduced unrebutted testimony which established that the Respondent instituted unilateral changes in leadperson's duties and pay after the strike. This resulted at least in part from Respondent's shrinking of the work force after the initial surge of hiring the first few days of the strike. As the work force diminished, employees who were used primarily as leadpersons were required to man the stations and thus performed fewer and sometimes none of the leadpersons' duties. The shrinking of the work force was the result of Respondent's decision to delay the return of the strikers by not replacing its work force after the initial surge of hiring the first few days of the strike as a result of the transfer of work out of the plant and the unilateral institution of numerous process changes. Moreover, there was evidence of disparate treatment by Respondent of the strikers and nonstrikers. Thus some leadpersons ceased performing leadperson duties such as assisting with training of employees and problems on the line and relieving employees and doing necessary paperwork as the number of employees diminished. In some instances nonstrikers continued to receive a 25-cent-per-hour increment although they no longer performed leadperson duties. Conversely, returning strikers were required to perform leadperson duties but were not paid the 25-cent-per-hour increment for doing so.

Under these circumstances, I find that Respondent violated Section 8(a)(5) and (1) of the Act by its unilateral elimination of leadpersons duties and pay without bargaining these changes with the Union. I find that Respondent's reliance on the contractual right in the labor agreement to reduce the work force does not lend support to its position that it had the right to unilaterally eliminate leadperson duties and pay. I further find that the unrebutted evidence that certain nonstriking employees were permitted to retain their 25-cent-per-hour increment although they were no longer required to perform leadperson duties whereas certain returning strikers were required to perform leadperson duties with no increment in pay is evidence of disparate treatment practiced by Respondent against returning strikers which I conclude based on the established animus toward employees who supported the Union in the strike was the motivating factor in Respondent's disparate treatment toward the returning strikers. I find that Respondent has failed to rebut this evidence. I therefore conclude that Respondent also violated Section 8(a)(3) and (1) of the Act by its disparate treatment of returning strikers with respect to leadperson duties and pay. I recommend that

[6] The January 14 session lasted past midnight into January 15.

Respondent be required to extend retention of leadperson pay with backpay and interest to the returning strikers who were leadpersons at the time of the strike in accordance with its extension of this benefit to nonstriking employees.

I. *The Alleged Unilateral Elimination of Bargaining Unit Jobs*

The General Counsel contends that the Respondent violated Section 8(a)(5) and (1) of the Act by the unilateral elimination of jobs without bargaining with the Union. The General Counsel contends that as a result of Respondent's ''predetermination to rid itself of the Union'' ''the only possible interpretations of its actions are (1) that in fact jobs have not been eliminated and Respondent has advanced the defense as a shifting pretext for its unlawful refusal to recall strikers as its employment complement declined; or (2) that Respondent engaged in deliberate concealment of job eliminations from the Union and a 'flagrant' disregard of its bargaining obligation.'' In support of its contention the General Counsel relies on the direct testimony of Plant Manager DeFalco who it called as an adverse witness and who was questioned at length concerning planned and actual employment levels and direct and indirect employees and concludes that the plant was originally slated to employ approximately 500 people and that the decline in the work force after the strike was ''an unwarranted underutilization of this facility.'' The General Counsel contends that numerous process changes testified to by Respondent's engineer, William Hayes, did not account for the down sizing of the work force and that even if they did that Respondent had an obligation to bargain about the elimination of jobs.

The Respondent produced a multitude of basically unrebutted testimony which I credit which demonstrated that the plant had never achieved the original production standards, that as a result of a continuous production line in the plant, numerous bottlenecks occurred which hampered production, that the paint department had an airflow problem that resulted in dirt and debris in the paint utilized to paint the motors, that as a result of these and other process problems and poor housekeeping the plant was inefficient and produced an inferior product with numerous quality problems and resulting in dissatisfied customers and a deterioration of the demand for the product.

As a result a new plant manager, Sam DeFalco, was brought in with instructions to get the quality problems resolved, obtain a satisfactory production yield, and only then maintain schedule. To this end DeFalco shut down the plant for a day, cleaned up the debris, met with the employees, and stressed that the job must be done right the first time and eliminated inspectors and drastically reduced the number of repair persons as a result of improved product quality.

Analysis

I credit the testimony of Engineer Hayes and other witnesses concerning numerous process changes which eliminated bottlenecks and problems and improved quality. I also credit the testimony of DeFalco that he discontinued making certain motors until the quality and product yields could be improved. I do not find that any of the process changes made in this regard were unlawful nor that the initial shutdown of production by DeFalco were unlawful. As the Supreme Court has recognized, ''bargaining over management decisions that have a substantial impact on the continued availability of employment should be required only if the benefit, for labor management relations and the collective-bargaining process, outweighs the burden placed on the conduct of the business.'' *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 667 (1981). See also *Otis Elevator Co*., 269 NLRB 891 (1984), wherein the majority of a three-member panel held there was no duty to bargain over ''decisions which effect the scope, direction or nature of the business'' but that bargaining was required over management decisions which turn ''upon a reduction of labor costs.'' See also *Pertec Computer Corp*., 284 NLRB 810 (1987). In the instant case it appears that these various process changes were ongoing efforts to improve plant efficiency and the quality of the product rather than on a reduction in labor costs. I thus find no violation was committed by the various process changes.

However, the collective-bargaining agreement entered into by the Respondent and the Union effective January 21, 1986, states at article XIV:

> *Rates for New or Changed Jobs*
>
> When the installation of new equipment or a change in methods, layout or work assignments result in the creation of a new job classification and/or the elimination of a job classification and/or results in a significant change in the job responsibilities of existing job classifications, the company will notify the union and request negotiations on the effected job classification. During the period of negotiation, the company shall establish a rate for the job classification in line with the current scale for like work. [Emphasis added.]

There was no evidence of any waiver by the Union to be notified of the elimination or changes in job positions contemplated by the Respondent. Notwithstanding this, various jobs were eliminated such as inspectors and leadmen and the Union was never notified of these actions by the Respondent.

Accordingly, I find that the Respondent had a clear duty to bargain concerning the effects of its process changes such as the elimination of jobs such as inspectors and leadmen but failed to do so or to even notify the Union of these job eliminations and thereby violated Section 8(a)(5) and (1) of the Act. See *Collateral Control Corp*., 288 NLRB 308 (1988). Re: subcontracting, *SMCO, Inc*., 286 NLRB 1291, 1296 fn. 18 (1987). Re: bargaining over effects of decision to close, *St. Louis Gateway Hotel*, 286 NLRB 863 (1987). Re: duty to bargain on effects of decision to close, *Sands Motel*, 280 NLRB 132 (1986); *Central Soya Co*., 281 NLRB 1308 (1986).

J. *The Alleged Unilateral Imposition of a ''Labor Pool'' Policy*

The General Counsel contends that the Respondent violated Section 8(a)(5) of the Act by its unilateral imposition of a ''Labor Pool'' policy and its consequent change from its prior practice of having employees designated in specific jobs and that such changes in policy and practice were also violative of Section 8(a)(3) as they were discriminatorily motivated by and part of Respondent's unlawful scheme to defeat strikers' recall rights and to rid itself of the Union. In support of its position the General Counsel produced a large

number of witnesses who testified that they were seldom moved prior to the strike but that after the strike they were moved frequently. Respondent produced witnesses who testified they were moved to other jobs prior to the strike but certain of these witnesses also testified they were moved more frequently after the strike. Some of the movement prior to the strike was associated with the shutdown of the second shift in 1985 and the transfer of some of those employees to the first shift. Some of the transfers in 1985 were also associated with a layoff of employees in 1985. The General Counsel produced exhibits based on Respondent's daily labor records that showed that the total number of transfers per employees in 1985 were significantly lower than those in 1986 after the strike. Union Business Representative Barnes testified without rebuttal and was corroborated by Chief Steward Reba Cook that the term ''labor pools'' was not used in negotiations although the Union had offered a proposal in its 1985 negotiations to create a utility crew which would be subject to movement and paid an additional increment in wages for this in response to complaints by the few employees who were subject to movement. By and large the few employees who were subject to movement were more knowledgeable or skilled leadpersons who were used to assist other employees or fill in with their departments and occasionally in other departments. The Respondent rejected the Union's proposal to create a utility crew as proposed by the Union. Chief Steward Reba Cook testified without rebuttal that Plant Manager John Florip told her that the skills of the various positions were not interchangeable.

However, shortly after the strike the Respondent commenced to create its concept of a labor pool whereby employees could be moved from one job to another. Employees hired as strike replacements were told they would be moved frequently as required. Supervisors told employees they were part of a pool. In a ''Memo from the Desk of Sam DeFalco'' in late 1987 Plant Manager DeFalco reflected on achievements of 1987 and stated in pertinent part ''Some of the improvements are obvious as you look at the plant. Many people wondered what changed. Simply stated a team developed instead of individuals we are a more flexible organization. Our lives are not dedicated to one Specific job, and therefore, we can reorganize the schedule as our customer's needs change. Since all of our workers are now trained in more than one job, our productivity has soared. That fact has created the ability to compete in world wide competition. . . . The variety of work has allowed an employee to have some control over their jobs and how they, are to be done. . . . Our flexibility has given birth to a concept that creates an atmosphere of change.'' Moreover DeFalco acknowledged on the stand that this policy was a change and that he had neither notified the Union or offered to bargain concerning it.

Respondent relies on testimony of employees who testified they were transferred from one job to another prior to the strike and on records for selected periods of 1985, 1986, and 1987 which show a larger number of permanent transfers of labor grade 3 employees prior to the strike than after the strike. However, the General Counsel points out that the total number of employees in 1985 was significantly greater than in 1986 and 1987 and that the significant statistic is the number of transfers per employee which increased significantly from 1985 to 1986. The Respondent also relies on contractual language in the management-rights clause which permits it ''to temporarily transfer employees, between jobs, shifts, and departments in order to maintain efficient and/or economical operations.''

Analysis

I find that the General Counsel has established that the Respondent engaged in an unprecedented policy of utilizing employees as part of a labor pool system as it saw fit after the advent of the strike. Initially, the evidence is convincing based on both the overwhelming testimony that there was a significant increase in the transfers of employees after the strike from the periods prior thereto. Moreover, the advent of this policy was specifically acknowledged in the memo of Plant Manager DeFalco in late 1987 and by his testimony on the stand at the hearing wherein he described numerous changes and acknowledged that he had not notified or bargained with the Union concerning them. I also find the records are supportive of the General Counsel's position as they show that transfers per employee increased significantly in 1986 from those of 1985 prior to the strike. I also find that the contract language of the management-rights clause is not relevant to this issue as it addresses only a recognition that there may be a necessity for temporary transfers which had concededly occurred in the past.

I therefore find that the Respondent violated Section 8(a)(5) and (1) of the Act by its institution of a labor pool policy and deviated from its past practice of assigning employees to a single job with only limited transfers without bargaining with the Union. I also find that the utilization of this policy was in part motivated by its efforts to thwart the return of the strikers by transferring the replacement employees to job openings rather than recalling strikers and that Respondent has failed to demonstrate that it would have instituted this policy in the absence of this unlawful motive and that Respondent accordingly also violated Section 8(a)(3) and (1) of the Act by the implementation of the labor pool among its labor grade 3 employees.

K. *The Withdrawal of Recognition and Additional Alleged Unilateral Changes*

The Respondent withdrew recognition from the Union by its letter of November 17, 1986, from Employee Manager John Stoy and by a followup letter of December 1, 1986, by its attorney and chief negotiator, James Miles, ostensibly on the basis of a decertification petition which was circulated and signed by 153 of 286 bargaining unit employees on October 23 and 24, 1986, and presented to Plant Manager Sam DeFalco. Prior to the withdrawal of recognition Plant Manager DeFalco's son-in-law, Supervisor Todd Nicholas, told employees that a petition had been circulated and that management would know who signed it. Additionally, DeFalco in his ''Luncheon with Sam'' meetings in the fall of 1986 alluded to the fact that he could not do anything with respect to adding additional employees and a wage raise until after the first of the year, an apparent reference to the expiration of the labor agreement which would permit an employer to rely on a decertification petition. Subsequent to the withdrawal of recognition by the Respondent, the Respondent also instituted unilateral increases in wages and benefits, removed the union bulletin board and engaged in direct bargaining with its employees concerning the attendance policy,

and instituted a new attendance policy. It also announced on January 26, 1987, that its original daily schedule for January was not attainable and that rather than ''recall employees for the balance of January and reduce employees on February 1,'' it had decided to spread the January arrears (units which were scheduled for January but not built) into February. Pursuant thereto it increased scheduled overtime. The records bear out the General Counsel's contention that the increase in overtime was significant after this point.

Respondent contends it did not commit any other unfair labor practices and therefore was entitled to withdraw recognition on the basis of the decertification petition signed by a majority of employees in the bargaining unit and that assuming arguendo that it did commit unfair labor practices, that they did not contribute significantly to the loss of majority.

Analysis

I find that the Respondent violated Section 8(a)(5) and (1) of the Act by its withdrawal of recognition from the Union on the basis of the decertification petition as the alleged doubt of majority status of the Union was not asserted in a context free of unfair labor practices. See *Guerdon Industries*, 218 NLRB 658, 659 (1975), citing *Barrington Plaza & Tragniew*, 185 NLRB 962 (1970), enf. denied on other grounds 470 F.2d 669 (9th Cir. 1972). Re: an incumbent union's presumption of continued majority status following the expiration of a collective-bargaining agreement . See *Guerdon Industries*, supra, citing *NLRB v . Gulfmont Hotel Co*., 362 F.2d 588 (5th Cir. 1966), enfg. 147 NLRB 997 (1964). Re: The presumption may be rebutted by evidence that the union has lost its majority status or by a good-faith doubt on the part of the employer based on objective considerations (such as the decertification petition in the instant case). See *Guerdon*, supra citing *Nu-Southern Dyeing & Finishing*, 179 NLRB 573 fn. 1 (1969), enfd. in part 444 F.2d. 11 (4th Cir. 1971). Re: The employer must show that the doubt was asserted in a context free of unfair labor practices. In making this decision, I have considered the numerous unfair labor practices committed by Respondent in this case reaching to the top level of the plant management and spanning over a 2-year period and my conclusion that the Respondent engaged in an overall pattern of unlawful activities including unlawful promises of jobs, benefits, and pay raises, threats of discharge, and plant closure among others and refusal and delay in recalling strikers and discrimination against returning strikers, which is not an exhaustive list of the violations found. In these circumstances, I find that Respondent clearly did not have a good-faith doubt of the Union's majority status as the circulation of the petition did not occur in a context free of unfair labor practices. *Choctawhatchee Electric*, 274 NLRB 595 (1985).

I accordingly also find that Respondent violated Section 8(a)(5) and (1) of the Act by its unilateral implementation of wage and benefit increases, by its direct dealing with the employees concerning the attendance policy, by its implementation of a new attendance policy, and by its insertion of the new union policy in its handbook and its removal of the Union's bulletin board. I further find it violated Section 8(a)(5) and (1) of the Act by its unilateral change of its overtime policy rather than recall strikers in January 1987 and also violated Section 8(a)(3) and (1) of the Act thereby as I find that this change in overtime policy was part of its unlawful efforts to thwart the return of the strikers .

L. *The Alleged Discriminatory Actions of Respondent in Hiring Excess Replacement Workers and Refusing to Recall Strikers*

There is an overwhelming amount of evidence in this case that the Respondent formulated and carried out a plan to rid itself of the Union and its supporters. Initially the number of 8(a)(1) violations found to have been committed over a 2-year period despite the entry into two separate settlement agreements by Respondent which agreements I have found were properly set aside by the Regional Director establishes Respondent's animus toward the Union and its supporters. These 8(a)(1) violations involved threats of futility of support for the Union (i.e., the parties would be negotiating next year by Plant Manager Florip and the picket line statement by Florip that it would be ''a cold day in hell'' before the strikers got a contract), and threats of job loss, among others. They also involved promises of benefits if the employees would withdraw their support for the Union. Moreover, the course of bargaining itself supports a finding and I so find that the Respondent sought to frustrate the collective-bargaining process (i.e., the sudden offer of a raise to take place immediately in October 1985 to the temporary replacement for the Union's chief spokesman although the parties had previously agreed to defer the discussion of economic matters until the contract language had been worked out and the comments of the Respondent's chief spokesman in December 1985 to the Union's chief spokesman that it would take a strike to settle the contractual disagreements and obtain an initial contract and the chief spokesman's refusal to bargain further on the eve of the strike claiming fatigue and its rush to declare impasse which I find did not exist as the Union was continuing to make movements and had not asserted a hard and fast position).

Moreover the Respondent's rush to implement increases in wages and benefits on the first day of the strike on January 15, 1986, which I find were unlawfully implemented as no valid impasse existed, and Respondent's rush to advertise for and employ new employees and to recall its employees on layoff and its unprecedented increase of its prestrike complement by in excess of 50 employees over a 6-day period including an intervening weekend from January 15 to 21 when the Union sent the Employer a notice on behalf of the striking employees of their unconditional request for reinstatement and its refusal to rehire several strikers who made individual offers of reinstatement at 7 a.m. on January 20, 1986, despite Respondent's hire of new employees on that date clearly establish the Respondent's unlawful motivation in the hire of excess employees to frustrate the recall rights of the strikers and rid itself of the Union and its supporters. I find particularly significant and pretextual the timing of Respondent's contention as soon as it received notice of the Union's offer of return on behalf of the strikers that it had hired a sufficient number of employees. As there was no evidence presented by Respondent that it sought to hire a predetermined number of new employees, I find the sudden cessation of hiring on learning of the unconditional offer to return made on behalf of the strikers is evidence of Respondent's unlawful purpose of shutting out the strikers and frustrating their recall rights. I have carefully reviewed all Re-

spondent's explanations for its conduct in the hiring of excess employees and suddenly declaring that it had replaced all of its employees and its subsequent refusal to recall more than nine of the strikers over the period of over a year despite the decrease in the work force after the new hire flurry of activity in January 1986 until the point in late summer and fall of 1986 and continuing thereafter when the work force had decreased to less than prestrike levels. I have specifically considered among others, the Respondent's contentions that the excess hire of new employees was necessitated by the upcoming busy season, the anticipation that there would be a significant turnover, the need to have these new employees quickly as their instructors were drawn from other plants to train them and reject these reasons as pretextual. I also reject as pretextual the reasons put forward by Respondent and most particularly its plant manager, Sam DeFalco, that his decision not to recall strikers after the loss of a significant number of replacement employees was premised on his need to clean up the product quality problems and resolve various plant problems by decreasing production until matters were successfully resolved. As found above, I credit the testimony of employee Evelyn King that DeFalco told the employees gathered at the September luncheon meeting that there would not be any new employees added until after the end of the year (a time when the labor agreement was due to expire) and that he told the employees that he could get all the work they could handle and the testimony of employees that DeFalco told them at the October luncheon meeting that he would look at a few strikers but it would only be a few and that he realized that people got caught up in the flow of things and that it would be awfully cold out there in January and awfully warm inside. I find that these statements clearly support a finding that DeFalco was informing the employees that he was in charge of their destiny and that all pay increases and benefits would flow from him and was encouraging the employees to support his position as management's representative in its fight against the Union and was threatening dire consequences for those striking employees who had gotten caught up in the flow of things, thereby threatening the employees with dire consequences if they supported the Union.

In addition to the foregoing, I have considered the lengthy testimony by Respondent's president and other officers, and former Calhoun Plant Manager Florip, its current Calhoun Plant Manager DeFalco, concerning the original poor design of he plant to the Respondent's needs as an assembly plant as a result of the configuration of the single assembly line resulting in bottleneck and work force problems and concerning various other quality and scheduling problems. Although I find that those problems did exist as indicated in the testimony, I find that they were not the real reason for the Respondent's initial hire of over 50 excess strike replacements in January 1986 and its subsequent allowance of the work force to deteriorate to below prestrike levels without recalling any significant numbers of its employees who had engaged in the brief strike in January and who had presented themselves for unconditional reinstatement and were awaiting recall, until April 1987 shortly after the filing of new charges with the Board by the Union.

I also find that the Respondent's actions in changing to a labor pool system from what had originally been a system of assigned positions with designated duties with some limited transfers and interchange of duties was still another piece of the scheme to defeat the strikers' recall rights as Respondent initiated a pool system, downgrading leader positions and contending it could transfer employees from one job to another interchangeably, thus allowing it to transfer employees from one position to another in order to avoid recalling strikers. I also find that Respondent's actions were discriminatory motivated in arbitrarily assigning returning strikers to positions and ignoring the returning strikers' experience or lack thereof in certain jobs and positions in this recall process and adhering to the position that the returning striker must assume the position dictated by Respondent notwithstanding difficulties encountered in doing so or inability to perform the duties as well as the evidence of disparate treatment of returning strikers such as with the continued assignment of Faye Parker and Jerry Holcomb to the boxmaking job in the pack department despite problems encountered in performing this job by these employees and the issuance of warnings to these employees, the refusal to permit employee James Bold to return to his prestrike job in the packing department at a time when employee Faye Parker was encountering difficulty therein and James Bold was experiencing problems in the small motor assembly position and the refusal of Respondent to let other employees in the pack department volunteer to handle the boxmaking job to relieve Parker and Holcomb and the issuance of warnings to Parker and Holcomb for not meeting a quota in the boxmaking jobs. I have also considered the direction by Production Manager Tetzlaff to nonstriker employee Connie Davis to work the ''ass off'' returning striker Reba Cook who was a union bargaining committee member and chief steward. The foregoing convinces me that Respondent undertook to make the return to work intolerable to returning strikers and to make them prove themselves as if they were new employees on probation to punish them in retaliation for their engagement in concerted activities on behalf of the Union and to discourage them from exercising their rights to return to work in the hope that they would become discouraged and quit.

Thus, I find that the Respondent sought the strike with a preconceived plan to rid itself of the Union and that it immediately seized on the opportunity of the strike to institute changes in the wages and benefits and institute other changes as found here and to hire an excess complement of employees in order to thwart the reinstatement rights of striking employees, that it manipulated its production needs in order to assure that only a token amount of strikers would be recalled until April 1987 shortly after the filing of new charges, that it retaliated against the strikers by denying their recall rights, and promotional opportunities and by placing them in positions for which they were not suited and by subjecting them to more onerous working conditions and disparate treatment than other employees who had not engaged in the strike. I thus find that Respondent violated Section 8(a)(3) and (1) of the Act by its delay in recalling strikers, by its denial of promotional opportunities of the returning strikers, by its imposition of more onerous working conditions on the returning strikers, by its misclassification of the returning strikers, and by the discipline of the returning strikers as found here. *Laidlaw Corp*., 171 NLRB 1366 (1968); *Fire Alert*, 207 NLRB 885, 886 (1973); *MCC Pacific Valves*, 244 NLRB

931, 933 (1979); *Blackberry Creek Trading*, 291 NLRB 474 (1988).

M. *The Alleged Tainted Recall Procedure*

Following the filing of charges by the Union in this case concerning the Respondent's failure to recall strikers, the Union and Respondent's representative James Miles met together in the spring of 1987 along with a representative of Region 10 of the National Labor Relations Board. According to Miles, the Union and the Board representative insisted that strikers be first recalled in the order in which their replacements were terminated and thereafter seniority would be used. This relates to the Respondent's method of designation of the new employees hired shortly after the strike prior to the Union's offer of reinstatement on behalf of the strikers as replacements for particular strikers. Employee Relations Manager John Stoy and Personnel Director Robert Earlie testified that as new hires were brought in, the new employees were told by the striking employees on the picket line that they would only be temporary replacements and in order to assure them that they were permanent replacements for the strikers, Earlie and Stoy had them each sign and date a blank form designating them as permanent replacements and later filled in the clock number and name of the striker the new employee was replacing. The excess number of employees hired in addition to these employees replacing strikers did not have a clock number assigned to them. The General Counsel does not contend that recalling strikers in the order that their designated replacement left the work force was unlawful in itself but contends that the Respondent subverted the Union's suggestion in order to achieve its unlawful ends in defeating the Union.

The General Counsel contends that the Union's communications addressed only the order that the strikers would be reinstated but not the jobs to which they would be reinstated and that the Union specifically objected to any labor pool concept which would disregard the strikers' previous experience. This is borne out by the July 13 and 14 letters of Union Business Manager Barnes to Plant Manager DeFalco and Respondent's attorney and spokesman, Miles. Notwithstanding the Union's position, when strikers were recalled they were placed wherever Respondent decided to place them without regard to their previous experience on the job or their prior position. Thus, employees in the pack department were placed in upper motor department and employees in the shine department were placed in the pack department as examples. Moreover, grade 4 strikers were offered grade 3 assembly positions and at least until July 1987 were not told they could retain their rights to Grade 4 positions if they declined a grade 3 position. The Respondent takes the position that all the grade 3 positions are substantially equivalent positions and that it fulfilled its *Laidlaw* obligations when it offered the returning strikers grade 3 jobs regardless of where they were or what they involved. The evidence also showed that when strikers were recalled they were often not permitted to give adequate notice to any employer they might be working for and were required to return almost at once (i.e., the recall of Faye Parker to pack). In addition Respondent relying on its use of a labor pool concept after the strike (here found to be unlawful supra in this decision) posted and accepted bids on grade 4 jobs and transferred its replacement employees throughout the plant to fill vacancies in positions rather than recall strikers or allow strikers to bid. As a result of Respondent's manipulative conduct in permitting its current work force to bid on and transfer to more desirable jobs, the returning strikers were often given only the less desirable jobs not withstanding their prior experience and good performance on other jobs. The result was that a number of employees declined to accept the position offered and did not return to employment with Respondent. Still others experienced problems with the different jobs in which they were placed and were disciplined or quit as a result.

Analysis

Based on the foregoing, I find that the recall of strikers by Respondent was fatally tainted throughout and did not satisfy its *Laidlaw* obligations. I specifically reject Respondent's position that its grade 3 positions were essentially the same or similar as to constitute substantially equivalent positions. I further find that Respondent's recall of the strikers was grudging as contended by the General Counsel and their experience was ignored and they were required to stay in jobs for which they were unsuited even when they experienced problems with them (i.e., the cases of James Bold, Faye Parker, Jerry Holcomb, and Patty Densmore discussed infra and also Richard Hutchins and Jack Holland). Respondent's attitude to the returning strikers was to treat them as new hires who needed to pay their dues and earn their way back to Respondent's good graces (i.e., the case of Faye Parker). Examples of Respondent's discriminatory treatment of returning strikers (are the comments by Tetzlaff to Davis concerning returning striker Reba Cook and of Tetzlaff and Free concerning socializing with returned strikers). Moreover, some returning strikers were disciplined (Parker, Holcomb, and Bold) and others such as Richard Hutchins and Jack Holland quit because of their assignment to more arduous jobs or for which they were not suited.

Under the above circumstances, I find that Respondent did not satisfy its *Laidlaw* obligations and that it engaged in discriminatory conduct against the strikers in violation of Section 8(a)(3) and (1) of the Act. I have reviewed the individual cases cited by Respondent in its brief and perceive no need for addressing them individually in this decision as my decision is that those employees who were not returned to their former positions or substantially equivalent ones as they became vacant were not properly reinstated. I further find that Respondent has failed to demonstrate the substantial equivalency of the various positions. Specifically, I find that the positions in the pack department were not substantially equivalent to those in the various assembly departments or to those in the shine or paint departments and that the positions in the shine or paint departments were not substantially similar to each other or to the pack or assembly departments. Furthermore the evidence demonstrated that there were substantial differences between positions within departments (i.e., the V8 line and smaller lines as testified to by Densmore, box machine and the reader rail in the pack department). I fully recognize that it may have been difficult for Respondent to exactly match the strikers' old job with those available on his or her return. However, it appears that Respondent made little or no effort to even come close in most cases as has been discussed previously. I thus conclude that Respondent did not satisfy its obligations under *Laidlaw*

and has failed to demonstrate that it returned, the strikers to substantially equivalent positions.

N. *The Reprimand of Connie Davis and Her Subsequent Job Assignments*

Connie Davis has been employed by Respondent since February 1984. She worked on the V8 rope line. She did not go out on strike with the other employees in January 1986. The record establishes that Connie Davis was a well-regarded experienced employee who had been called on in the past to serve as a floor inspector and to train other employees. She had also occasionally relieved on other jobs as required. As set out above Davis incurred the displeasure of Production Manager Tetzlaff when she ignored his direction to ''work the ass off'' returning striker Reba Cook and instead commenced taking breaks with her and when she reported a prank by employee Jerry Holt who put an enlarged copy of the Respondent's antiunion policy in its handbook at Cook's work station. On July 16, 1987, Supervisor Todd Nicholas announced several changes in assignments. He placed Tammy Owens, who was regarded as one of the fastest workers, in the first position occupied by Davis on the 2-cylinder rope motor line next to Reba Cook who was in the position which permitted Owens to set the pace on that line and increase the line speed. He also placed Davis in the second position on the 2-cylinder electric motor line which according to the testimony of Davis and her sister Louise Hurt was overloaded and difficult to keep up with. Davis protested loud and clear to Nicholas who told the employees that it was Tetzlaff's decision. He also told Davis that he had a purpose for this. Davis failed to meet the required 75-percent standard which was 10 motors per day on the first 2 days of her assignment to the job and was monitored by Engineers James Hays and David Burns on the second day who reported that she was banging things around and appeared to be angry. Davis was then called into the office at the end of the second day and in the presence of Employee Relations Manager Stoy given a written reprimand by Supervisor Nicholas for failing to reach standard. There had been no verbal counseling of Davis prior to this. Davis' and her sister Louise Hurt testified at length concerning Davis recurring habit of speaking in anger to Supervisor Nicholas if she was unhappy with an assignment or problem and that she would do the work and apologize to him. Davis relationship with Nicholas was an open one where she spoke her mind freely as did Nicholas. This was the first discipline ever for Davis although she had on prior occasions failed to meet the required production standards, as had other employees assigned to the electrical line. On the following day Davis met the production standard and asked Nicholas to retract the warning. He checked with his superiors and reported that the warning would not be retracted. Shortly after this date Davis was asked whether she would be willing to build pumpers and agreed to do so but has since been moved on an almost daily basis. The General Counsel contends that this movement of Davis because the issuance of the warning is also discriminatory.

The Respondent presented evidence through the testimony of Todd Nicholas that there was a need to increase the speed of the electric rope line as a greater demand for these motors was anticipated and that Tammy Owens was therefore assigned to the first position on that line to increase the pace and production in place of Connie Davis as Tammy Owens was one of the fastest workers. Davis was assigned to the second position on the electric line where Owens had been in first position and Patty Densmore had been in the second position. Davis expressed her displeasure and, according to the testimony of Nicholas, Tetzlaff, and Engineers James Hays and David Burns who observed her on July 16 and 17, Davis did not meet her production standard of 10 motors because she was angry and her movements were thus jerky and this slowed down her production. Respondent contends that there is little difference between the building of motors on the rope and electric lines and that Davis should have been able to reach the required minimum 75 percent of standard shortly after being assigned there but failed to do so as a result of her anger and resultant lack of coordinated effort. Respondent also contends that the alleged statements by Free and Tetzlaff concerning her getting too close with the Union were vague and remote in time as they occurred over 2 months prior to the July incident. Respondent also contends that the allegation concerning discriminatory movement of Davis is without merit as Davis agreed to the assignment of the pumper motors but because of their erratic receipt from the Respondent's Burnesville, North Carolina facility in lots of 100 per shipment rather than on a daily basis, it has had to assign Saturday work to meet the production schedule for these motors and has not been able to keep Davis on this job full time as originally anticipated and has thus used her within the department as required on other positions.

Analysis

I find the General Counsel has established a prima facie case of a violation of Section 8(a)(3) and (1) of the Act by the issuance of the written warning to Davis by Respondents. Initially I have credited Davis concerning the comments made to her by Supervisor Greg Free and Production Manager Tetzlaff concerning their perception of her support of the strikers and Union by reason of her association with returning strikers and by reason of her defense of Reba Cook from the antiunion prank by employee Jerry Holt. The timing of the issuance of the warning to Davis after only her second day on the job as well as the unrebutted testimony of Davis and her sister Louise Hurt, whom I credit, that certain lines had failed to meet production standards in the past and that employees had been moved to other jobs for which they were better suited and were not disciplined for failing to meet production standards are evidence of disparate treatment. Additionally, the issuance of the written warning without any prior verbal warning, given the previous openness between Supervisor Nicholas and Davis wherein each spoke their minds about problems is a noteworthy change in the relationship between Nicholas and Davis. Additionally the assignment of Tammy Owens, one of the fastest employees in building the motors, to the first position on the 2-cycle rope motor line put her in the position to speed up Reba Cook and ''work her ass off'' which Davis had declined to do as originally requested by Tetzlaff.

I find that Respondent has not rebutted the prima facie case of a violation by evidence presented by its engineers, James Hays and David Burns, that Davis was making erratic moves and letting equipment snap back into place causing tangled lines and that Davis appeared angry, although this evidence was bolstered by the testimony of Nicholas and of

Davis herself who testified that she was angry with her reassignment to the second position on the electric line. Initially I find that the movement of Tammy Owens to Davis' place on the line was discriminatorly motivated by Tetzlaff's desire to ''work the ass off'' Reba Cook. I also find that Davis' movement to the electric line was inextricably enterwined with the move of Owens to Davis place on the rope line and that any discipline received by Davis (and particularly the warning in question) flowed from this act of disparate treatment exercised against Reba Cook, and the warning to Davis was thus a violation of the Act. I thus find that Respondent has not rebutted the prima facie case of a violation of the Act by the preponderance of the evidence and has not demonstrated it would have issued the warning to Davis even in the absence of her engagement in protected activities by association with former striking employees and by her defense of employee Reba Cook from the antiunion pranks of employe Jerry Holt. *Wright Line*, 251 NLRB 1083 (1980).

I further find that the General Counsel has not established a prima facie case of a violation of the Act by its assignment of Davis to the pumpers and her movement from job to job as a result of the erratic supply of the pumpers from the Burnesville facility and in light of Davis' own testimony that she had agreed to build the pumpers and had not filed a charge concerning these assignments. I accordingly will recommend dismissal of the allegation concerning the assignment of Davis to a number of different jobs thereafter.

O. *The Written Warning Issued to Employee Patty Densmore*

Patty Densmore was one of five employees originally hired by Respondent in August 1983 during its startup phase of the Calhoun Plant. She worked on several motors including the 2-cycle motor, V6's and pumpers and on two occasions was called on to work on the V8 motor lines. Prior to the strike she was a leadperson on the 2-cycle engine line. She was an experienced employee who had been upgraded to leadperson and who had been praised by management. When the strike commenced in January 1986 she participated in the strike and was on the picket line everyday. She was recalled to work on May 1 and returned on May 17, 1987. When she was recalled, she was assigned to work with another employee on the V8 line which was a one-person line. Ray Rampley, who had been working alone for some time on the V8 line, was assigned to train her. Within a few days she was assigned to the V8 line alone. She requested to return to the 2-cycle motor line, but this request was ignored. Consistent with Respondent's unilateral elimination of leadperson positions, she had not been designated as a leadperson. However, indicative of her experience as a leadperson, and Respondent's need for a leadperson on the 2-cycle line she was required to fill in on that line and to train new employees but did not receive leadperson pay, whereas other nonstriking employees received an additional increment in pay indicative of leadperson status although they merely worked a station on the line and did not function as a leadperson. Densmore encountered difficulty in meeting the minimum 75 percent of standard required by Respondent which entailed building one V8 motor every seventy minutes by herself. She testified that the V8 motor is a much larger motor than the 2-cycle motor thus requiring her to lift and move heavy parts and that the torque on the airhammers for the V8 motor is greater than for the smaller 2-cycle motors which she had previously built. In addition she encountered parts problems as the kit of parts prepared by kit makers did not always contain all the parts, requiring her to yell for parts or to leave the line and to go get the part herself all resulting in a loss of production time. Her Supervisor Greg Free observed that she was not making the required minimum 75 percent of standard and he and other members of management met with Densmore and discussed this. Although she requested to return to the 2-cycle line, this request was denied although other employees were added to the 2-cycle line. She was observed and a timestudy was made of her movements by Engineer David Burns in early June 1987 who observed that she was only performing at about 60 percent of the standard rate instead of the required 75 percent. Burns concluded that Densmore's effort was higher than her production level as a result of looking for parts in her parts kit, double handling, fumbling, and awkwardness with her tools and that the parts kit problems only accounted for 3 to 4 percent of her lost production. Supervisor Free made a special effort to stress to the parts chaser who prepared the parts kit to have all the parts in the kit for Densmore. Densmore testified she nevertheless encountered missing parts. The Calhoun Plant was shut down for inventory from June 29 to July 13, 1987. After the shutdown Densmore was again assigned to the V8 line on her return on July 13. Supervisor Free issued her a written warning on July 16 as she had been on the job for 8 weeks and was only producing at 60 percent.

Analysis

The General Counsel contends that Respondent assigned Densmore to the heavy and arduous job of working on the V8 line ignoring her experience on the 2-cycle line and refused to permit her to return to the 2-cycle line or to relieve her from the V8 line where she was encountering trouble consistent with its pattern of treating the returning strikers as new hires and ignoring their requests for transfers to positions they were experienced with and taking the position that the assigned job was the only one available with the resultant placing of employees in jobs for which they were unsuited or on which they encountered problems, and that this differed from its treatment of employees in the past wherein employees were transferred from jobs in which they encountered difficulty to jobs which they could handle. The Respondent contends that it treated Densmore fairly as her selection as one of the most experienced employees for the V8 line was reasonable and that it worked with Densmore to achieve the desired production but she failed to do so and that her warning was consistent with discipline issued to other employees for failing to meet production levels before and after the strike. I find that the evidence is manifest that the Respondent in this case as in others, consistent with its animus to the recall of strikers and to the strikers on their return placed the returning strikers in the jobs left over after nonstriking employees had been assigned to the more desirable jobs as the results of Respondent's unilateral imposition of the labor pool system and its permitting nonstriking workers to bid on and transfer to jobs as they became open rather than to recall strikers until the spring of 1987 after charges had been filed with the National Labor Relations Board alleging as unlawful the failure to recall the strikers. Thus, in

Densmore's case, her experience on the 2-cycle line was ignored although apparently needed on that line as she was called in to substitute in training new employees on that line and her requests to return to that line were ignored even though openings occurred on the line after her return to work in May 1987. Although Respondent did assist Densmore in her efforts to reach the required 75 percent of standard, it is clear that it took the inflexible position that this was the only job available for her and ignored its own past practice of transferring employees from jobs on which they had encountered problems (i.e., the testimony of Connie Davis, her sister Louise Hurt, and Densmore). I find that this inflexible position of Respondent carried forward to the point of issuing a written warning to Densmore was the result of Respondent's animus toward the strikers, its unlawful recall procedures which resulted in the placement of returning strikers in jobs for which they were unsuited and insisting that they perform at the desired minimum standards rather than transferring them to jobs at which they were experienced. I thus find that the General Counsel has made a prima facie case that the warning issued to Densmore was the result of Respondent's animus toward her for her support of the strike and its overall pattern of treating returning strikers as new hires who must prove themselves or pay their dues. I am not convinced by Respondent's evidence that it acted out of business necessity in its conduct with respect to Densmore and the issuance of the warning to her. I thus find that Respondent has failed to rebut the prima facie case established by the General Counsel and that Respondent violated Section 8(a)(3) and (1) of the Act by its issuance of the written warning to Densmore and by its assignment of more arduous work to her ignoring her prior experience. *Wright Line*, supra.

P. *The Written Warnings Issued to Employees Dave Parker and Jerry Holcomb*

Glenda Faye Parker and Jerry Holcomb were employed at the Calhoun Plant prior to the strike. Parker was assigned to the shine line where the motors are washed and polished and decals are attached to them; Parker was also a member of the Union's organizing committee. At the time of the election in December 1984, Parker wore a union button on the date of the election, and Plant Manager John Florip commented to her, ''So, you decided to go that way, huh.'' She replied in the affirmative and Florip said, ''We'll still be negotiating a year from now.'' Holcomb was a Grade 4 tester and a union steward for the test department in January 1986 when the strike commenced. Both Parker and Holcomb participated in the strike and walked the picket line daily. Parker was recalled to work by a letter dated April 20, 1987, and returned on April 30, 1987. Holcomb was recalled to work as a grade 3 assembler employee and returned on May 6, 1987. Holcomb was not advised that he had a right to refuse the grade 3 position and to await an opening for a Grade 4 position if he chose as Respondent did not commence advising its Grade 4 employees of their right to decline lower rated grade 3 positions without waiving their rights to Grade 4 openings until after June 1987. Parker was initially assigned to upper motor cover but was reassigned to the pack department when returning striker Richard Hutchins quit after being assigned to the boxmaking job in the pack department. Holcomb was initially assigned to the boxmaking job along with Parker on his return. Prior to Parker's assignment to the pack department there had never been a woman assigned to the boxmaking job in the pack department although women served as packers in this department. Parker and Holcomb encountered problems in meeting the required 75 percent of standard minimum building 25 boxes per hour. Both employees complained to Brian Harrison, the supervisor in the pack department on numerous occasions concerning the demands of the job which requires that they stand on a wood stand elevated above the floor and lift and put together large cardboard boxes to be used by the packers. According to Parker and Holcomb they suffered a great deal of harassment from Harrison and other management officials as a result of their failure to meet standard. Parker and Holcomb complained of pain in their feet as a result of the configuration of the stand and problems with defective boxes. Parker particularly complained concerning back problems suffered as a result of working on the boxmaking stand. Both sides in this case paraded a host of witnesses with the General Counsel's witnesses generally stressing the theme that no woman had ever been assigned the boxmaking job prior thereto, that the job is more easily handled by a younger person, that the work is arduous and tedious, and that other employees had requested to be moved to the boxmaking stand at the same time that Holcomb and Parker were encountering problems but were denied the requests. For a brief period Harrison assigned Parker to assist an employee who made up owners' kits in the department and he received favorable reports on Parker's performance. As a result of a timestudy, Respondent determined that two employees were needed in the owners' kit area and, although Parker had requested to work in this area, the Supervisor Harrison in fact brought in Edna Mundy (another returning striker) to work in the job as the opening occurred on a single day of vacation that Parker was taking. When Parker returned to work the next day, Harrison decided he could not move Edna Mundy who had been ''trained'' on the job the single day before. The new employee subsequently bid on a job in the paint department and Parker was then slated to be transferred, but Mundy declined the job in paint and this ended the transfer option for Parker.

The Respondent presented a series of witnesses who generally testified that the boxmaking job although requiring physical exertion was not arduous and was not difficult to learn and that the required minimum 75 percent of standard was easy to achieve within a short period of time (a day or so). Employee Tom Petty a young man who is 5 feet 6 inches tall and weighs 120 pounds testified he did not consider the job demanding and easily exceeded the required minimum standard of 22.5 boxes per hour (which had been reduced from 25 per hour after a timestudy), but was told by employee Holcomb with whom he filled in on Parker's absence from the job not to exceed the minimum or Respondent would upgrade it. The Respondent also presented witnesses including Harrison who testified that it made a number of efforts to improve the situation on the boxmaking stand for Holcomb and Parker including the making of a metal attachment for the stand after Holcomb and Parker complained of problems with their feet as the result of the job and the timing of Holcomb and Parker by engineers who found that they were working above the required 75 percent of standard but that their performance dropped when they were not being timed. Ultimately Parker and Holcomb received two written warnings for not meeting the required 75

percent of standard (22.5 boxes per hour). One warning was issued to each of them on May 21, 1987, and a final warning was issued to each of them on June 25, 1987, after which date they immediately achieved the 75 percent of standard. During the course of the hearing in this case which spanned from September to December 1987, Parker was moved in October 1987 from boxmaking to the owner's kit area of the pack department after Mundy bid out of the department.

Analysis

After a review of all the foregoing and the record as a whole I conclude that the General Counsel has made a prima facie case of a violation of the Act by Respondent by the continued assignment of Parker and Holcomb to the boxmaking job and by its issuance of the two warning letters to Holcomb and Parker. Initially I find that the original assignment of Holcomb and Parker resulted from Respondent's overall pattern of placing the experienced returning strikers in beginning or undesirable positions and ignoring their experience and requiring them to pay their dues. When employees encountered problems on the new jobs they were told this was the only job available to them and their requests to transfer, which had previously been honored before the strike, were now rebuffed, and they were harassed to produce at the Respondent's standard or were disciplined if they did not. I was impressed by Parker's detailed testimony and believe that management was well aware she was encountering physical problems as result of her assignment to this job. However, it appeared that management's attitude was one of determination to punish the strikers and particularly those who had been active in their support of the Union as Parker and Holcomb were. As the General Counsel points out in its brief, management was aware of Parker's complaint as a result of a charge filed at the same time it was refusing to transfer another strike returnee James Bold to his old job as a boxmaker in the pack department. It appears to me that management was content to suffer the consequences of foregoing the experience of returning strikers in their positions at the time of the strike and required them to adapt to wherever it chose to put them or suffer the consequences of discipline related to their inability to adapt to the new position. I was not convinced of management's sincerity in its efforts to alleviate certain problems for Parker and Holcomb but rather found these efforts to be tempered by its motivation to appear reasonable while continuing its efforts to punish the returning strikers or encourage them to quit. I do not consider Parker's and Holcomb's ability to perform up to and above the required minimum of standard while under the scrutiny of the timestudy to require a finding that they were faking their problems with the box stand or were consistently able to meet the required minimum unimpeded by physical problems. It appears to me that the boxmaking job is a physically demanding job (i.e., the requirement of standing on an elevated platform lifting and folding heavy cardboard boxes at a set pace) that may be performed with ease by persons who are in adequate physical condition but is nonetheless an arduous job that may cause physical problems for others. I find that management's intransigent position that this was the only opening for Holcomb, an experienced Grade 4 test employee, and Parker, also an experienced employee, and its refusal to transfer them notwithstanding their requests and the offer of other employees to take over the boxmaking task (i.e., Teems) is indicative of this resolve to punish the returning strikers and make them pay their dues. There may have been some testing of the wills between Holcomb and Parker and Respondent's management. However, I find it was the result of Respondent's cavalier discrimination against Parker and Holcomb. Respondent's assertion that it could not transfer Parker to the original opening of a second position in the owner's kit area of the pack department because a new employee (Mundy) had been assigned to this position and was trained for all of 1 day is without merit. In sum I find that the Respondent has not rebutted the General Counsel's prima facie case, and I find that Respondent violated Section 8(a)(3) and (1) of the Act by the assignment of arduous tasks to Holcomb and Parker and by the issuance of written warnings to them because of their failure to meet Respondent's production requirements because of their engagement in protected concerted activities in striking the employer and because of their support of the Union, *Wright Line*, supra.

Q. *The Discharge of Employee James Bold*

James Bold was initially hired by Respondent in 1984 and worked in a department designated as lower unit until about a month and a half before the strike in January 1986 when he was transferred to the pack department. He had apparently performed satisfactorily in these departments. On August 17, 1987, Bold was recalled to work and assigned to powerhead to assemble VROs (fuel pumps) and carburetors on the V6 motor line and was supervised by Greg Free. He was required to assemble 10 VROs per hour or 14-1/2 carburetors and to thus keep the five station V6 production line supplied with VROs and carburetors. As the V6 production line is set up with 5 stations, five motors per hour are the required standard. It is necessary that the person assigned to assemble five VROs and five carburetors per hour does so in order to keep the V6 line running. As a result of Bold's failure to build the required amount of VROs and carburetors, his Supervisor Greg Free was repeatedly required to move other employees to assist Bold in building the VROs and carburetors. On August 18, Free requested a study of Bold's assembly methods and Engineer Terry Stewart spent 3-1/2 hours observing Bold and offering Bold suggestions for improving his performance, including arrangement of the station and sequence of the assembly process. On the following day, Bold assembled enough VROs and carburetors to keep the assembly line supplied and running. Thereafter his production deteriorated and on August 20, 21, and 24 production on the V6 line was stopped as a result of Bold's failure to keep the line supplied with VROs and carburetors. On August 21, Plant Manager DeFalco received a complaint from three of the women on the V6 production line concerning Bold's offensive body odor and went to Bold on the plant floor and asked Bold if he had the correct tools and parts and whether he could do anything to help him. Bold indicated he had everything he needed and that his performance would improve. DeFalco also told Bold to clean himself up as the result of the complaints concerning his body odor. On August 24, Free again requested assistance from the engineering department and Engineer David Burns was sent to observe Bold and observed the same sequencing problems that had been observed by Engineer Terry Stewart. Burns again instructed Bold on proper sequencing and concluded that Bold's major problem was that he was not putting forth

a sufficient amount of effort to adequately perform his job. As a result of the foregoing, Free issued Bold a verbal warning on August 24. Bold failed to meet the production standard for the next 3 days and was issued a final warning by Free on August 26. Bold requested a transfer which was denied. The V6 line was shut down on August 27 and Free told Bold to continue to work at his station to give him the opportunity to get ahead on his work. Bold assembled 24 carburetors that day. The next day the V6 line was started up again but Bold was unable to assemble sufficient VROs to keep the line running. Free then met with his supervisor, Tetzlaff, and DeFalco also became involved and subsequently at 9 a.m. that morning Free and DeFalco met with Bold in DeFalco's office. DeFalco told Bold there was a serious problem with his work and asked if there was anything he could do to help him and Bold replied in the negative. DeFalco asked Bold whether there were any jobs he could do and Bold asked to work in the lower unit but was told by DeFalco that the lower unit had been eliminated. Bold then asked to be transferred to the pack department and was told there were no openings in pack. DeFalco again asked Bold whether there was anything he could do to help Bold reach his production rate and Bold said there was not. By the end of the day, Bold's production was only 44 percent rather than the 75 percent of standard and he was terminated by Free at the end of the shift.

Analysis

I find that the General Counsel has established a prima facie case of a violation of the Act by the issuance of warnings and discharge of Bold by Respondent. Initially, there is ample evidence of Respondent's animus toward the strikers because of their engagement in protected activities by striking, I also find disparate treatment of Bold in this case. Initially, he was not placed in the pack department where he had worked prior to the strike. Although he certainly was not placed in an onerous or difficult position as his particular station had been previously used to give employees light work when they were unable to perform regular duties, it was obviously a position for which he was ill suited. Bold testified that because of his thick fingers he found it difficult to perform this type of assembly work. Although other employees may have performed this job with ease, Bold apparently was ill suited to it and encountered difficulties in performing it. Although the evidence appears overwhelming that Bold's failure to meet the production standard was dismal even with a large measure of help from Respondent's engineers and the assignment of other employees to help Bold, I do not find the evidence presented by Respondent to be sufficiently convincing to justify the conclusion that Bold's failure to make standard was the result of a willful lack of effort on his part. Rather I find that the evidence of past practice of moving employees from jobs on which they encountered difficulty prior to the strike and its refusal to move Bold to another job in pack at the same time that Parker was experiencing difficulty in the pack department and had asked to be moved convinces me that Respondent discriminated against Bold by exercising disparate treatment against him because of his support of the strike. I find Bold's body odor problem to be a nonissue in this case as it was by Respondent's admission not relied on by Respondent for its issuance of the warnings to Bold and for its discharge of him.

I also conclude that the assembly of VROs and carburetors was not substantially equivalent to Bold's job in the pack department and that Bold was not properly reinstated so as to satisfy Respondent's *Laidlaw* obligation. Under the above circumstances, I find that the General Counsel has established Respondent violated Section 8(a)(3) and (1) of the Act by its failure to properly reinstate Bold to his prior position in pack as openings occurred and that he is entitled to be offered his old position in the pack department or one substantially equivalent thereto and that Respondent violated Section 8(a)(3) and (1) of the Act by its issuance of the warnings to Bold and by its discharge of Bold. Implicit in this finding is a finding that the General Counsel established a prima facie case of these violations and that the Respondent failed to rebut them by a preponderance of the evidence, *Laidlaw*, supra; *Wright Line*, supra.

THE REMEDY

Having found that the Respondent has engaged in violations of the Act, it will be recommended that Respondent cease and desist therefrom and take certain affirmative actions designed to effectuate the purposes and policies of the Act and post the appropriate notice.

In accordance with my findings that Respondent unlawfully implemented its last proposal in January 1986 and imposed various unilateral changes in terms and conditions of employment, it shall be ordered to rescind these changes including its implementation of a labor pool, abolishment of leadman positions, and pay for leadman duties and elimination of bargaining unit jobs. In accordance with my findings that Respondent unlawfully withdrew recognition from the Union following the expiration of the collective-bargaining agreement, I shall order Respondent to rescind its withdrawal of recognition and to recognize and bargain with the Union on request and to rescind all unilateral changes following its withdrawal of recognition its direct dealing with its unit employees and subsequent imposition of a new attendance policy, its removal of the union bulletin board, and the insertion of an antiunion clause in its personnel manual. I shall also order Respondent to make any and all payments that would otherwise have been due under the terms of the expired labor agreement. The Board does not require that employees suffer the loss of wages and or improvements in benefits or the addition of new benefits under circumstances such as these and I, accordingly, do not recommend that the increases in wages and improvements in benefits or the addition of new benefits by Respondent on or after its implementation of its proposal in January 1986 or after the expiration of the collective-bargaining agreement in January 1987 be rescinded.

I also recommend that the strikers be made whole with backpay with interest for all loss of wages and benefits sustained by them as a result of the delay in recalling them or as the result of the unlawful method and procedures of recall and or the result of any lack of acceptance by them of a position offered to them which was not substantially equivalent to their former position or as the result of any discipline including suspension or discharge or as the result of any quit by the employee as a result of his placement on a job that was not substantially equivalent to his former position. I fur-

ther recommend that all discipline of strikers as a result of problems with their work performance associated with a new job to which they were returned that was not substantially equivalent be rescinded and that Respondent expunge from its files any reference to the discipline and inform the employees in writing thereof and the employees be reinstated to their positions prior to the strike or to a substantially equivalent one if their former position no longer exists. I do not recommend the displacement of any striker currently on a job to accomplish this.

Respondent's withdrawal of recognition and refusal to bargain, as found above, constituted a complete rejection of the Union and of their employees' rights to representation for purposes of collective bargaining. Further the numerous unfair labor practices committed by Respondent in its unlawful scheme to defeat the Union were pervasive in disregard of the rights of the employees under the Act. I, accordingly, recommend that a broad order be issued to Respondent requiring it to cease and desist from violating the Act in any other manner. *Hickmott Foods*, 242 NLRB 1357 (1979). I also recommend that Respondents be ordered to preserve and make available to the Board or its agents, on request, for inspection and copying, all records necessary to determine the payments due and owing by Respondent under the terms of this Order, and to ensure that Respondent has otherwise complied with the terms of this Order.

It is further recommended that the employees be made whole with interest for all loss of earnings and benefits suffered by any employees of the Respondent by reason of the Respondent's imposition of unilateral changes in the terms and conditions of employment of its employees and by reason of Respondent's withdrawal of recognition from the Union and refusal to bargain with the Union, as found above. This shall be computed in accordance with backpay for any loss of earnings and benefits suffered by any of the striking employees by reason of Respondent's delay in recalling the employees who went out on strike after their unconditional offer to return to work and by Respondent's unlawful recall procedures and by employees who suffered specific acts of discrimination such as James Bold and shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950). Interest shall be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[7]

I do not recommend a visitatorial order as requested by the General Counsel. See *Cherokee Marine Terminal*, 287 NLRB 1080 (1988).

I further recommend that Respondent restore the status quo ante to January 15, 1986, until the Respondent has, on request, bargained with the Union and reached agreement or a valid impasse and that the initial date of union certification be treated as beginning on the date this Order is complied with.

[7] Interest on and after January 1, 1987, shall be computed at the ''short-term Federal rate'' for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621. Interest on amounts accrued prior to January 1, 1987 (the effective date of the 1986 amendment to 26 U.S.C. § 6621), shall be computed in accordance with *Florida Steel Corp.*, 231 NLRB 651 (1977).

V. THE EFFECT OF THE UNFAIR LABOR PRACTICES ON COMMERCE

The unfair labor practices as found here in section IV, above, in connection with the business of Respondent as found in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes obstructing the free flow of commerce.

CONCLUSIONS OF LAW

1. The Respondent is an employer within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The appropriate unit is all production and maintenance employees employed by Respondent at its factory at 100 Marine Drive, Calhoun, Georgia, including all shipping and receiving employees and plant clerical employees, but excluding all office clerical employees, salesmen, professional employees, guards and supervisors as defined in the Act.

4. Respondent violated Section 8(a)(1) of the Act by threats made to employees Ty Bramlett and Molly Evans, by its supervisor, Dick Andrews, in November 1984 that upper management suspected that employee Larry Mulkey was talking about a union and was looking at ways to terminate him.

5. Respondent violated Section 8(a)(1) of the Act by threats of plant closure issued by its manufacturing manager, Ronald Tetzlaff, to employee Connie Davis during the period prior to the election in November 1984.

6. Respondent violated Section 8(a)(1) of the Act by threats of plant closure made by its supervisor, Greg Free, in March and April 1985 to employee Connie Davis.

7. Respondent violated Section 8(a)(1) of the Act by threats of plant closure made by its supervisor, Mark Dunn, to employees Richard Hutchins, Ray Moore, and Julius Sexton in November 1984.

8. Respondent violated Section 8(a)(1) of the Act by the interrogation incorporated with a promise of a benefit of employee Julius Sexton by Supervisor Greg Free around the first of April 1985.

9. Respondent violated Section 8(a)(1) of the Act by the threats of futility of the employees' support for the Union made by Plant Manager John Florip on election day to employees Richard Hutchins and Faye Parker.

10. Respondent violated Section 8(a)(1) of the Act by the threat to employees around the first of November 1985 by its supervisor, Steve Fowler, with the futility of their support for the Union and their engagement in a strike and with the loss of their jobs if they went on strike.

11. Respondent violated Section 8(a)(1) of the Act by the threat of plant closure and loss of their jobs issued by Production Manager Ronald Tetzlaff about a month before the strike to employees if they went on strike.

12. Respondent violated Section 8(a)(1) of the Act by the threat issued by Supervisor George Hutchinson a few weeks before the strike to employee Connie Davis that the plant would be closed if the employees went on strike.

13. Respondent violated Section 8(a)(1) of the Act by the threats issued by Production Manager Terry Fulmer after the election to employee Glenda Sue Purvis that if the employ-

ees went on strike, they would have trouble getting jobs in the Calhoun, Georgia area or surrounding areas.

14. Respondent violated Section 8(a)(1) of the Act by the threat of futility issued by Supervisor Howard Gallman in December 1985 to employees Reba Cook and Evelyn King that the Respondent would never enter into a labor agreement.

15. Respondent violated Section 8(a)(1) of the Act by the promise of a good supervisory position made to Chief Union Steward Ray Moore in December 1985 by Production Manager Fulmer if Moore agreed to help Fulmer get rid of the Union.

16. Respondent violated Section 8(a)(1) of the Act by the threats issued to employee Jack Holland by Plant Manager John Florip in December 1985 concerning the futility of the employees' support for the Union as the employees would never get a contract and that if the employees struck they would lose their jobs and would never work again in Gordon County, Georgia.

17. Respondent violated Section 8(a)(1) of the Act by the threat of futility of the employees' support of the Union issued by Production Manager Terry Fulmer in early January 1986 to employee Reba Cook when he told her the Respondent would not give the employees a contract.

18. Respondent violated Section 8(a)(1) of the Act by the threat issued by Supervisor Howard Gallman about a week before the strike to employee Eunice Darlene Rayburn that she would lose her job and benefits and that Respondent would give her a bad recommendation if she went on strike.

19. Respondent violated Section 8(a)(1) of the Act by the threat issued by Supervisor George Hutchinson shortly prior to the strike to employee Eunice Darlene Rayburn that if she went out on strike she would lose her job and benefits and that Respondent was going to get the Union out of the State of Georgia.

20. Respondent did not violate the Act by the responses by Supervisor Howard Gallman to inquiries by Eunice Darlene Rayburn as to pay and benefits she would receive if she returned while on strike.

21. Respondent violated Section 8(a)(1) of the Act by the threat issued by Supervisor George Hutchinson shortly after the strike commenced to employee Eunice Darlene Rayburn that Respondent did not want anyone with a union card in response to her inquiry about returning to work during the strike.

22. Respondent violated Section 8(a)(1) of the Act by the threat issued by Plant Manager John Florip in January 1986 to Chief Steward and employee Ray Moore on the picket line that it would be ''a cold day in hell'' before the employees got a contract.

23. Respondent violated Section 8(a)(1) of the Act by the threat issued by Supervisor Bo Harris in February 1986 to employee Evelyn King not to count on being recalled as the Respondent had hired 50 extra employees to replace the striking employees.

24. Respondent violated Section 8(a)(1) of the Act by the interrogation and implied threats by Supervisor Todd Nicholas of employee Nancy Cochran in October 1986 concerning the signing of a decertification petition.

25. Respondent violated Section 8(a)(1) of the Act by threats issued by Plant Manager Sam DeFalco by telling the employees at the September 1986 ''Luncheon with Sam'' meeting that he could not hire employees at present although he could sell all the motors he could build and that he would not hire any more employees until the recall list was over in January and that he would only look at a few strikers in January and by DeFalco's comments that the work force at the unionized plant up North had been reduced and that he did not think a new contract would be signed at that plant. Respondent also violated Section 8(a)(1) of the Act by DeFalco's comments that other plants' employees were getting raises but Calhoun plant employees would not get a raise as there was a ''third party'' (the Union) which constituted a promise of benefits if the employees got rid of the Union.

26. Respondent violated Section 8(a)(1) of the Act by the threats issued by Plant Manager DeFalco in January 1987 that the Calhoun plant would stay union free which were designed to convey the message that it was futile to support the Union.

27. Respondent violated Section 8(a)(1) of the Act by the direction issued by Production Manager Ronald Tetzlaff in April 1987 to employee Connie Davis to impose onerous working conditions on employee Reba Cook because of her engagement in the strike.

28. Respondent violated Section 8(a)(1) of the Act by the comment by Production Manager Ronald Tetzlaff in May 1987 to employee Reba Cook that he would take care of employee Connie Davis which was a threat of unspecified reprisal against Davis because of her concerted activity in defending her fellow employee Reba Cook from harassment because of Cook's union activities.

29. Respondent violated Section 8(a)(1) of the Act by the threat of an unspecified reprisal issued by Supervisor Greg Free to employee Connie Davis to be careful about her association with union supporters as some members of management thought she was being swayed by the Union.

30. Respondent violated Section 8(a)(1) of the Act by the threat of unspecified reprisal made by Production Manager Ronald Tetzlaff to employee Connie Davis in retaliation for her concerted activities.

31. There was no impasse in bargaining on January 15, 1986.

32. Respondent violated Section 8(a)(5) and (1) of the Act by its unilateral advertising and implementation of wage and benefit increases in January 1986.

33. Respondent violated Section 8(a)(5) and (1) of the Act by its refusal to bargain with respect to training employees for the peer review appeals panel.

34. Respondent violated Section 8(a)(5) and (1) of the Act by its unilateral elimination of leadpersons' duties and pay and inspectors and other positions without bargaining these changes with the Union. Respondent also violated Section 8(a)(3) and (1) of the Act by its disparate treatment of returning strikers with respect to leadpersons' duties and pay.

35. Respondent violated Section 8(a)(5), (3), and (1) of the Act by its institution of a labor pool policy.

36. Respondent violated Section 8(a)(5) and (1) of the Act by its withdrawal of recognition from the Union and its implementation of additional unilateral changes in wages and benefits, engaging in direct dealing with its employees thereby passing the Union, concerning the attendance policy, and by implementing unilaterally a new attendance policy and violated Section 8(a)(3), (5), and (1) of the Act by its unilat-

eral change of its overtime policy, and by its removal of the Union's bulletin Board and the insertion of the antiunion policy in its personnel manual and failing and refusing to abide by the terms of its expired labor agreement.

37. Respondent violated Section 8(a)(3) and (1) of the Act by hiring excess replacement employees and by its refusal and delay in recalling strikers and its method of recall of strikers.

38. Respondent violated Section 8(a)(3) and (1) of the Act by its issuance of warnings to employees Connie Davis, Patty Densmore, Glenda Faye Parker, Jerry Holcomb, and James Bold; by its imposition of more onerous work on employees Patty Densmore, Glenda Faye Parker, and Jerry Holcomb; and by its discharge of employee James Bold.

39. The settlement agreements in Cases 10–CA–20636 and 10–CA–21564 were properly set aside by the Regional Director.

40. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

[Recommended Order omitted from publication.]